

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

366

Docket No. 22,881

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TABLE OF CONTENTS

Table of Cases	(ii)
Issues Presented	1
Statement of the Case	3
Prior Proceedings	3
Statement of Facts	7
Summary of Argument	19
Argument	22
I. The False Testimony of a Critical Government Witness Denied Appellant a Fair Trial	22
II. The Government's Failure to Disclose its Witness's Prior Repudiation of the Testimony He Gave Against Appellant Requires a New Trial	32
III. Appellant Has Been Denied his Right to a Speedy Appeal	37
Conclusion	39

TABLE OF CASES

* <u>Barbee v. Warden</u> , 331 F.2d 842 (4th Cir. 1964) . . .	33, 36
<u>Berry v. Georgia</u> , 10 Ga. 511 (1851)	22
* <u>Chapman v. California</u> , 386 U.S. 18 (1967)	25, 26, 37
<u>Communist Party v. Subversive Activities Control Board</u> , 351 U.S. 115 (1956)	26
<u>Fahy v. Connecticut</u> , 375 U.S. 85 (1963)	25, 26
<u>Griffin v. United States</u> , 87 U.S. App. D.C. 172, 183 F.2d 990 (D.C. Cir. 1950)	29, 36
<u>Hardy v. United States</u> , 375 U.S. 277 (1964)	38
* <u>Holmes v. United States</u> , 127 U.S. App. D.C. 332, 383 F.2d 925 (D.C. Cir. 1967)	38
<u>Ingram v. Peyton</u> , 367 F.2d 933 (4th Cir. 1966) . . .	33, 35
<u>Larrison v. United States</u> , 24 F.2d 82 (7th Cir. 1928)	23
* <u>Levin v. Clark</u> , No. 20,682, November 15, 1967, petition for rehearing en banc denied, December 16, 1968 (D.C. Cir.)	33, 35, 36
* <u>Levin v. Katzenbach</u> , 124 U.S. App. D.C. 158, 363 F. 2d 287 (D.C. Cir. 1966)	33, 36
<u>Martin v. United States</u> , 17 F.2d 973 (5th Cir. 1927)	31
* <u>Mesarosh v. United States</u> , 352 U.S. 1 (1956)	28
* <u>Pettine v. New Mexico</u> , 201 Fed. 489 (8th Cir. 1912)	23, 26, 30
<u>Thompson v. United States</u> , 88 U.S. App. D.C. 235, 188 F.2d 652 (D.C. Cir. 1951)	22
<u>United States v. Consolidated Laundries Corp.</u> , 291 F.2d 563 (2d Cir. 1961)	33, 36

<u>United States v. Johnson</u> , 327 U.S. 106 (1946) . . .	23
<u>United States v. Poole</u> , 379 F.2d 645 (7th Cir. 1967)	33
<u>Williams v. United States</u> , 102 U.S. App. D.C. 51, 250 F.2d 19 (D.C. Cir. 1957)	38

*Cases principally relied on.

ISSUES PRESENTED

1. Is conviction on the false testimony of a critical Government witness consistent with due process and the proper administration of Federal criminal justice?
2. Did the Government breach its duty to disclose evidence favorable to the accused by failing to advise appellant that one of its three witnesses had previously denied under oath the very testimony he gave against appellant?
3. Has appellant been denied his right to a speedy appeal?

This case has been before this Court on six previous occasions.

(1) On March 1, 1968, appellant filed a petition for leave to appeal which was dismissed as moot on March 20, 1968. (Miscellaneous Docket number 3218).

(2) On March 25, 1968, the appointment of Hugh H. Obear as counsel for appellant was vacated and Ronald E. Madsen was appointed in his place. (Docket number 21,738).

(3) On June 13, 1968, this Court vacated the judgment of conviction and remanded for a new trial. (Docket number 21,738).

(4) On September 19, 1968, this Court vacated its order of June 13th and reinstated the appeal. (Docket number 21,738).

(5) On October 31, 1968, this Court denied appellant's renewed motion for bail, without prejudice

STATEMENT OF THE CASE

This case is a consolidation of two appeals, both in forma pauperis. Docket number 21,738 is an appeal from a judgment of the United States District Court for the District of Columbia dated January 16, 1968, adjudging appellant, Joseph W. Palmer, Jr., guilty on two counts, robbery and assault with a dangerous weapon, and sentencing him to thirty to ninety months on each count, the sentences to run concurrently. Docket number 22,881 is an appeal from an order of the United States District Court dated February 28, 1969, denying Palmer's motion for a new trial which was filed in that Court on December 9, 1968.

Prior Proceedings

Palmer, represented by court appointed counsel, was tried by jury on October 30 and 31, 1967, the Honorable Richmond B. Keech presiding. On November 22, 1967, Palmer, pro se, filed with the District Court a motion for a new trial on grounds of ineffective assistance of counsel and non-availability of a witness for the defense at the time of trial. The motion was denied on December 4, 1967.

Palmer's affidavit in support of his application to proceed without prepayment of costs was filed with the District Court on January 10, 1968, and denied,

to the filing of a subsequent motion on further allegations.

(6) On November 1, 1968, this Court denied a motion for production of certain Juvenile Court records (Docket number 21,738) and affirmed an order of the District Court denying a similar motion there, without prejudice to the filing of a motion for new trial and a new motion for production of the Juvenile Court records. (Docket number 22,388).

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Prior Proceedings

Palmer, represented by court appointed counsel, was tried by jury on October 30 and 31, 1967, the Honorable Richmond B. Keech presiding. On November 22, 1967, Palmer, pro se, filed with the District Court a motion for a new trial on grounds of ineffective assistance of counsel and non-availability of a witness for the defense at the time of trial. The motion was denied on December 4, 1967.

Palmer's affidavit in support of his application to proceed without prepayment of costs was filed with the District Court on January 10, 1968, and denied,

without prejudice, on January 12.

Palmer was sentenced on January 16, 1968.

On February 21, 1968, the District Court entered an order authorizing Palmer to proceed on appeal without prepayment of costs, directing that a transcript of the trial proceedings (except voir dire, opening statements and closing arguments) be furnished at Government expense and referring appointment of counsel for appeal to this Court.

On March 1, 1968, Palmer filed a petition with this Court seeking leave to appeal, (Miscellaneous Docket number 3218). This petition was dismissed as moot by this Court on March 20, 1968.

On March 25, 1968, Ronald E. Madsen was appointed by this Court to represent Palmer on appeal.

By letter of March 27, 1968, the Clerk of this Court informed appointed counsel that officials of the District Court had been unable to locate the Court Reporter who transcribed the first day of trial, or his notes.

On April 22, 1968, Palmer filed a motion for bail with the District Court which was denied by order of April 29, 1968.

On May 20, 1968, Palmer filed with this Court a motion for summary reversal and release pending retrial

(captioned as a Motion for New Trial and Bail) on the grounds that no transcript for the first day of his trial had been made available. The Government opposed. By order of June 13, 1968, this Court vacated the judgment of conviction of the District Court, remanded for a new trial and referred Palmer's motion for bail pending retrial to the District Court.

On or about July 25, 1968, the United States moved this Court to recall and vacate its order of remand on the grounds that the Court Reporter had been located.

On September 5, 1968, while this motion was pending, Palmer moved the District Court for issuance of a subpoena to the Clerk of the District of Columbia Juvenile Court for the production of the records of that Court in the trial of Charles Sydney Baisey. Baisey was the alleged accomplice of Palmer in the robbery and assault for which Palmer was convicted. The basis of Palmer's motion was information received by him subsequent to his conviction that a witness named David Hairston who testified for the United States at Palmer's trial had given the Juvenile Court a signed statement at Baisey's trial and that this statement contradicted the testimony given by Hairston at Palmer's trial.

On September 19, 1968, while the motion for production was pending in the District Court, this Court

granted the Government's motion to recall and vacate the order of remand of June 13th.

On September 20, 1968, the District Court denied Palmer's motion for production of the Juvenile Court records.

On September 27, 1968, Palmer moved this Court for production of the Juvenile Court records.

On October 3, 1968, Palmer renewed his motion in this Court for bail pending appeal.

Having filed a notice of appeal from the District Court's order denying his motion for production of the Juvenile Court records, Palmer moved this Court on October 8, 1968, to consolidate his motion for production in this Court with his appeal from the District Court's denial of the similar, prior motion in that Court.

On November 1, 1968, this Court denied Palmer's motion for production in this Court and affirmed the District Court's order denying the motion for production made there, without prejudice to the filing in the District Court of a motion for new trial and a new motion for production of the Juvenile Court records.

On October 21, 1968, this Court denied Palmer's renewal of his motion for bail pending appeal, without prejudice to a new motion on further allegations.

On December 9, 1968, Palmer filed in the Dis-

trict Court a motion for new trial and ancillary relief (production of the Juvenile Court records). A hearing on this motion at which the witness David Hairston testified was held on February 14, 1969. The motion was denied by order of the District Court filed on February 28, 1969.

Notice of appeal was filed and, on March 17, 1969, the District Court ordered preparation of a transcript of the proceedings in connection with the motion for a new trial.

Palmer's motion to consolidate the appeal from the judgment of conviction (Court of Appeals docket number 21,738) with the appeal from the District Court's order denying his motion for a new trial (Court of Appeals Docket number 22,881) was granted on April 9, 1969.

Statement of Facts

In the early morning hours of December 15, 1966, two young Negro men boarded a D. C. Transit bus which was proceeding down Georgia Avenue towards Fort MacNair. At approximately 5:30 a.m., the taller of the two men confronted the driver with a gun. The men took approximately four hundred bus tokens and other property, left the bus and ran. (Trial Transcript, 4-10).

Statements by an informer led police to interview David Hairston. In the presence of police, Hairston

stated that he went to the house of Charles Baisey on the morning of December 15, 1966, on the way to school, that he saw Baisey with a roll of bus tokens, that Baisey tried to sell him the bus tokens, and that Baisey told him he had held up a bus earlier that morning.⁽¹⁾ On December 20, 1966, the driver was taken to a juvenile detention center in the District of Columbia where he identified Baisey as the gun man in the robbery. (Trial Transcript, 15-16). Apparently, information led the police to suspect Palmer, for a warrant for his arrest was issued. Palmer heard of the warrant and turned himself in. (Pro se Motion for New Trial filed with the District Court on November 22, 1967, page 2.). On January 18, 1967, the bus driver was taken by Officer Ramey to the District of Columbia Court of General Sessions, at which time he saw Palmer and stated that he was the other man involved in the holdup. (Trial Transcript, 16-17).

Palmer was indicted by the grand jury for robbery and assault with a dangerous weapon on March 6, 1967.

On June 1, 1967, Baisey was tried in the Juvenile Court for the District of Columbia and found

⁽¹⁾ These facts are taken from the records of the District of Columbia Juvenile Court in Baisey's case.

"involved" in the bus robbery. At Baisey's trial, David Hairston took the stand, was sworn and testified that his statements to the police regarding Baisey were false. Counsel for Baisey introduced in evidence the following signed statement:

"I, David Hairston, 1200 Delaware Avenue, S. W., make this statement of my own free will that I told the police, 'Lucky Baisey told me he robbed a bus and I told them that Lucky tried to sell me tokens on December 15, 1966.'

This was not true and I did it because I was very made at Lucky because he would not give me back my shoes. I am very sorry that I have got Lucky in so much trouble.

Mr. French [counsel for Baisey] asked me very kindly to make this statement and I made this statement from my own free will, March 16, 1967."

(Transcript of hearing on February 14, 1969, on motion for new trial, pages 37-38, hereinafter, "Hearing Transcript").

Police detectives who investigated the case and to whom Hairston's statement was made were present in the courtroom when Hairston orally denied the truth of his statements to them and when he read the written statement above.(2)

The alleged involvement of Palmer in the offense for which Baisey was convicted, and the fact that charges were pending against Palmer at that time, were brought out repeatedly in the course of Baisey's trial. The petition against Baisey alleged that he had robbed a bus

(2) This appears from the Juvenile Court transcript of Baisey's trial, page 45, hereinafter, "Juvenile Transcript".

"together with Joseph Palmer. . . ." The bus driver testified at Baisey's trial that he previously identified the shorter of the two men who held him up in the Court of General Sessions. He was asked by the prosecutor whether there was a trial and replied as follows:

"A No, sir it was postponed. There is a trial pending.

Q Of this other person?

A I think so, yes, sir."
(Juvenile Transcript, 20-21)

During examination of Baisey, his counsel stated that the name of Joseph Palmer had been brought into the case and asked whether Baisey knew him. Baisey replied that he did know him, that he was his cousin. Baisey further testified that Palmer was in New York on the night of December 14, 1966. At this point, the Juvenile Court asked the prosecutor:

"THE COURT: . . . Am I correct, Mr. Salyer, that the status of the charges against Joseph Palmer are that they are lodged but not yet tried?

MR. SALYER: That is the way I understand it."
(Juvenile Transcript, 43-44)

Thus, at the time Hairston recanted his statements to the police and swore under oath that they were false, the investigating police officers, the Juvenile Court prosecutor and the Juvenile Court Judge were all well aware of the fact that criminal charges were then pending against

Palmer for the exact same incident in which Baisey was found involved and as to which Hairston had testified, on behalf of Baisey.

Represented by court appointed counsel, Palmer came to trial in the United States District Court on October 30, 1967. The Government called only three witnesses, the bus driver, Officer Ramey and David Hairston. The plan of the Government's case, as can be seen from a reading of the trial transcript, was skillfully designed to meet Palmer's defense that he was not the man. The bus driver would testify, as he did, that two men held him up, that Palmer was one of them and that Baisey was the other. Hairston would testify that he saw Baisey the morning of the robbery with a roll of bus tokens, and Hairston's testimony would be brought to bear on Palmer by linking Baisey up with Palmer at every possible occasion. Thus, the hazard of a one-to-one standoff between Palmer and the bus driver would be avoided and critical corroboration of the bus driver's testimony provided.

The importance to the Government's case of Hairston's corroborating testimony is apparent from the number of times the Government brought Baisey into the case and linked him with Palmer, though it was Palmer and not Baisey who was on trial. The bus driver was asked not only as to his identification of Palmer but also as to his

identification of Baisey. So that the point would not be lost on the jury, the driver's testimony as to his identification of Baisey was immediately followed by his testimony as to his identification of Palmer. (Trial Transcript, 15-17). When Officer Ramey took the stand, he was first asked, as the bus driver had been, whether he went with the bus driver to the identification of Baisey at the receiving home. The minute he finished his testimony as to the identification of Baisey, he, like the bus driver, was led to the identification of Palmer. (Trial Transcript, 28-30).

The first point of any importance in the Government's examination of Hairston was to establish through him that Baisey and Palmer were cousins. (Trial Transcript, 21-22). The relationship was stressed by the Government near the end of Hairston's testimony by bringing out the fact that Palmer's mother and Baisey's mother were sisters. (Trial Transcript, 25).

The Government continued to link Baisey and Palmer in its cross-examination of witnesses called by the defense, eliciting from Palmer's girl friend testimony that Baisey and Palmer were cousins, (Trial Transcript, 40), that Baisey lived at 1200 Delaware Avenue, S. W. (Trial Transcript, 40), that Palmer spent a lot of time at 1200 Delaware Avenue, S. W. and that this address was just across from

203 "N" Street where Palmer's mother lived. (Trial Transcript, 46). Before this witness left the stand, the Government had added the testimony that Palmer and Baisey were together all the time at Baisey's house and that Palmer and Baisey were good friends. (Trial Transcript, 48).

When Palmer's mother took the stand on the second day of trial, the Government renewed its efforts to link Baisey and Palmer. (Trial Transcript, second day, 12). When Palmer took the stand, his relationship as cousin and friend to Baisey was again stressed by the Government. (Trial Transcript, second day, 23).

Yet it was Palmer, and Palmer alone, who was brought to trial in the District Court. But the constant pressure of the Government on Baisey, at Palmer's trial, was not without reason. With the repeated linking of Palmer and Baisey, Hairston's testimony was able to achieve its full effect against Palmer. And it was Hairston, and Hairston alone, who corroborated the bus driver.

Under questioning by the Government, Hairston gave the same testimony that he had given the police prior to Baisey's trial. He stated that on the morning of December 15th he saw Baisey with a roll of bus tokens and that Baisey tried to sell him the bus tokens. It is apparent from the transcript that the Government was prepared to seek

testimony from Hairston as to a statement by Baisey regarding the source of the bus tokens. However, the prosecutor approached the bench before asking the question and the trial judge barred the testimony as hearsay. (Trial Transcript, 23-25).

Unarmed with the knowledge that Hairston had recanted the very testimony he had just given, appointed defense counsel conducted no cross examination. (Trial Transcript, 26).

Palmer's entire defense was that he was in New York on December 15, 1966. He so testified during direct examination. The defense called no witness from New York to testify to Palmer's presence there on December 15th. Palmer had stayed with his aunt in New York and testified that she was unable to attend the trial because she had recently undergone surgery. (Trial Transcript, second day, 20-21).

At the time of Baisey's trial, Palmer was in jail.⁽³⁾ It was not until after his trial (the summer of 1968, while serving time at Lorton on his conviction in this case) that he learned of Hairston's recantation. (Motion for New Trial and Ancillary Relief, affidavit of Joseph W. Palmer).

⁽³⁾ Though on bond from the District Court, Palmer was serving a sentence of 180 days on a conviction in the Court of General Sessions.

Palmer's counsel appointed for this appeal did not receive a transcript of the first day of Palmer's trial until November 12, 1968, and was then able to determine, for the first time, the importance of Hairston's testimony. When the transcript of Baisey's trial in the Juvenile Court was made available, the absolute inconsistency between what Hairston said in Juvenile Court and what he said at Palmer's trial became apparent, as did the obvious conclusion that Hairston had lied, under oath, either in the Juvenile Court or at Palmer's trial.

Palmer's motion for a new trial based on the fact of Hairston's false testimony was filed in the District Court and a hearing, at which Hairston testified, was held on February 14, 1969.

At this hearing, again under oath, Hairston explicitly and repeatedly recanted the testimony he had given at Palmer's trial. The two significant elements of Hairston's testimony at Palmer's trial were: (1) that he had seen Baisey with a roll of bus tokens on the morning of December 15th and (2) Baisey had tried to sell him these tokens. The following excerpts from Hairston's testimony disclose the recantation.

(1) Did Hairston see Baisey ("Lucky") with a roll of bus tokens on the morning of December 15, 1966?

Hairston's testimony at Palmer's trial:

"Q When you went there [Baisey's house] that particular morning [December 15, 1966] did you see Lucky?

A Yes, I did.

Q Did you have any dealings with him?

A Yes, I talked to him.

Q What happened?

A Well, I seen him with a roll of tokens.

Q You mean bus tokens?

A Yes."

(Trial Transcript, 23)

Hairston's subsequent testimony at the hearing on Palmer's motion for a new trial:

Hairston's testimony, above, was read to him and he was then asked:

"Q Did you see Mr. Baisey with a roll of tokens at that time?

A No, I did not."

(Hearing Transcript, 42-43)

Hairston's written statement to the Juvenile Court (Hearing Transcript, 37-38) was read to him and he was asked if it was true. He responded as follows:

"A No, sir.

Q In what way is it not true?

A . . . The only thing that was true is from up in his house I saw a few of those tokens in the front living room on the coffee table."
(Hearing Transcript, 38-39)

Hairston further testified as follows:

"Q Did you ever actually see any bus tokens on Mr. Baisey's person or in his hand or anything else?

A No, I did not.

Q Did you actually see any bus tokens at all at Mr. Baisey's home on December 15?

A No, I did not.
(Hearing Transcript, 43-44)

(2) Did Baisey try to sell Hairston bus tokens on the morning of December 15, 1966?

Hairston's testimony at Palmer's trial:

"Q What did Lucky try to do with the bus tokens, if anything?

A He tried to sell them.

Q To you?

A Yes.

Q Did you see about how many there were?

A No, I did not. They were in a little roll."
(Trial Transcript, 24-25)

Hairston's testimony (in the form of a signed statement) at Baisey's trial, prior to the trial of Palmer:

". . . I told the police, 'Lucky Baisey told me he robbed a bus and I told them that Lucky tried to sell me tokens on December 15, 1966.'

This was not true and I did it because I was very mad at Lucky. . . ."
(Hearing Transcript, 37-38)

Hairston's subsequent testimony at the hearing on Palmer's motion for a new trial:

Hairston's statement, above, was read to him and he was asked:

"Q Is this statement true?

A No, sir.

Q In what way is it not true?

A Well, in the first place about the shoes, Lucky, he had my shoes. But Lucky did not tell me he robbed the bus or anything like that. He did not try to sell me any tokens or anything like that.

* * * * *

"Q The second part, 'I told that Lucky tried to sell me tokens on December 15, 1966', Did you tell the police that?

A I told them, but it was not true.
(Hearing Transcript, 38-39)

Hairston's testimony at Palmer's trial, that Baisey tried to sell Hairston bus tokens, was read to him.

"Q Is that correct?

A No, sir. No, sir.

* * * * *

Q Did Mr. Baisey, commonly known as Lucky, ever try to sell you bus tokens?

A Not that I remember, no."
(Hearing Transcript, 43)

On this record, the basic question of fact was not whether Hairston was lying, but when he was lying. The District Court premised its decision on the conclusion that it was Hairston's testimony at Palmer's trial (that he saw Baisey with a roll of bus tokens and Baisey tried to sell them to him) that was false. The Court's opinion may be found at pages 63 through 67 of the transcript of the hearing on February 14, 1969, on Palmer's motion for a new trial.

SUMMARY OF ARGUMENT

The only significant corroboration of the complaining witness's testimony came from Government witness David Hairston, who testified that he saw not Palmer but Baisey with a roll of bus tokens shortly after the robbery and Baisey offered to sell them. This testimony was brought to bear against Palmer by repeatedly linking him to Baisey throughout the trial.

At the hearing on the motion for a new trial, after Palmer's trial, Hairston, under oath, flatly repudiated the testimony he had given against Palmer.

The District Court premised its decision on the conclusion that Hairston's testimony at Palmer's trial was false, but denied the motion on the grounds that there was sufficient other evidence on which the jury could have reached its verdict, and Hairston's testimony was not "so material" that the jury might have reached a different verdict" without it. In effect, the Court applied a harmless error test.

The use of this test to sustain a verdict where false testimony has been given against a defendant has been drastically curtailed by decisions of the United States Supreme Court. These decisions establish that such testimony must be wholly lacking in significance to the case before its admission can be held harmless and

the conviction sustained. Moreover, the Supreme Court has held that it does not remove the taint of false testimony for a reviewing court to find that there was sufficient other evidence to sustain the verdict. Having found that Hairston's testimony at Palmer's trial was false, the District Court should have granted the motion for a new trial.

At Baisey's trial in the Juvenile Court, prior to Palmer's trial, Hairston also repudiated, under oath, the very testimony he subsequently gave against Palmer. While the Assistant U. S. Attorney who prosecuted Palmer's case did not learn of this until after Palmer's trial, the police who investigated the robbery were present at the Juvenile Court trial when Hairston denied the testimony he later gave against Palmer. The police and the Juvenile Court prosecutor were aware that charges for the same incident were pending against Palmer. Under these circumstances, the Government's failure to disclose Hairston's Juvenile Court testimony to Palmer was a breach of its duty to disclose evidence favorable to the defense. Had the Government disclosed this prior testimony, the entire course of the trial would have been different, and the complaining witness's testimony would have gone uncorroborated. This showing of prejudice entitles Palmer to a new trial.

This appeal was delayed for nine months due to

the lack of a transcript of the first day of trial, a delay attributable solely to the Government. In the circumstances of this case, this unreasonable delay warrants dismissal of the indictment.

ARGUMENT

I

THE FALSE TESTIMONY OF
A CRITICAL GOVERNMENT
WITNESS DENIED APPELLANT
A FAIR TRIAL

(Trial Transcript, 1-34)
(Hearing Transcript, 30-47)

At the time he took the witness stand on behalf of the Government at Palmer's trial, David Hairston had already denied, under oath, the very testimony he was about to give against Palmer. Palmer did not learn of this until after his conviction. When he did, he moved for a new trial.

Federal court decisions disclose two distinct rules for the determination of motions for new trial on the ground of newly discovered evidence. These rules are not contradictory. They are simply applied to different situations. An "ordinary" motion for new trial on the ground of newly discovered evidence has traditionally been subjected to the five-point rule of Berry v. Georgia, 10 Ga. 511 (1851), delineated in this Circuit by this Court's decision in Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).⁽⁴⁾

⁽⁴⁾The requirements of this rule are that: (1) the evidence must have been discovered since the trial, (2) the movant must show diligence in the attempt to procure the newly discovered evidence, (3) the evidence relied on must not be merely cumulative or impeaching, (4) it must be material to the issues involved and, (5) of such nature that in a new trial it would probably produce an acquittal. Id. at 236, 188 F.2d at 653.

However, where false testimony by a prosecution witness is shown, or where a prosecution witness has recanted the testimony he gave at trial, a wholly different and far less stringent rule is applied. In these circumstances, the sufficiency of the motion for new trial has been tested against a three-point rule commonly referred to as the "Larrison rule."⁽⁵⁾ Here, a new trial will be granted when:

(1) the court is reasonably well satisfied that the testimony given by a material witness is false;

(2) without it the jury might have reached a different conclusion;

(3) the movant was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928).

The trial judge in the present case, in whose determination the factual issue rests, United States v. Johnson, 327 U. S. 106 (1946), found that the material testimony Hairston gave at Palmer's trial was false. (Hearing Transcript, 66). Since this is a case of false testi-

⁽⁵⁾ Larrison v. United States, 24 F.2d 82 (7th Cir. 1928). The earliest application of the rule in the Federal courts seems to be in Pettine v. New Mexico, 201 Fed. 489 (8th Cir. 1912), though it was more clearly enunciated in the Larrison decision and is frequently referred to by that name.

mony and subsequent recantation, the District Court properly chose to apply the Larrison rule, but, we respectfully submit, committed an error of law in its application of the rule to the determined facts of this case.

As to the first element of the applicable rule, the trial judge was "reasonably well satisfied that the testimony given by [Hairston] . . . was false," to use the language of the Larrison case, for he so found, and premised his entire decision on this finding, when he stated in his opinion on the motion for new trial that,

" . . . the court has proceeded on the premise that such part of the statement made by Hairston to the police as was used in Palmer's case was false." (Hearing Transcript, 66).

Hairston's statement to the police was in three parts: (1) that he saw Baisey with bus tokens, (2) that Baisey tried to sell him bus tokens, (3) that Baisey told him he got them by robbing a bus, all shortly after the robbery. The third part of the statement was never admitted at Palmer's trial, for the trial judge excluded it as hearsay at a bench conference. (Trial Transcript, 24). But the first two parts came in and were, unquestionably, the weight of corroboration which the Government labored so diligently, and successfully, to place in the trial scales by its repeated emphasis on Baisey and his identity with Palmer as cousin and friend.

The third element of the applicable test (the party moving for a new trial did not know the testimony was false until after the trial), is met in this case by Palmer's affidavit that he did not learn of Hairston's Juvenile Court testimony until after his own trial, coupled with the Government's prior acceptance of this statement. (Opposition to Defendant's Motion for New Trial and Ancillary Relief, page 2). This is only reasonable, since Palmer was in jail when Baisey was tried.

The crux of this case, then, is the second element of the rule, whether, as the trial judge himself phrased it, the jury might have reached a different verdict without the false testimony before it.

Where there has been constitutional error, a conviction may not be sustained on the grounds that the error was harmless in the context of the case unless the court can declare a belief that it was harmless "beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), (stating the test for reversal to be ". . . whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). The tests laid down by the Supreme Court in Fahy and Chapman are clearly directed to the same question that is asked in the application of the Larrison rule, whether a different result might have been reached. Since a conviction obtained on false testimony

violates due process, even if there is no showing that the prosecutor knew the testimony was false, Pettine v. New Mexico, 201 Fed. 489 (8th Cir. 1912), the Chapman and Fahy decisions require the Government to meet the impossible burden of proving beyond a reasonable doubt that the presence of Hairston's testimony did not contribute to the verdict obtained. Chapman v. United States, supra, at 24.

Earlier decisions of the Supreme Court dealing specifically with perjured testimony similarly restrict the courts' authority to sustain convictions on the grounds that there was sufficient evidence apart from that which was tainted^T or, conversely, that the tainted evidence was not so material that there might have been a different outcome if it had not been used. In Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956) the Board had determined that the Party was a "Communist-Action" organization, required to register as such under the governing Act. The Party sought review in this Court and, while the case was pending, filed a motion for leave to adduce newly discovered evidence, to wit, that the testimony of three of the witnesses on whom the Board relied was false. The Government, in contentions strikingly similar to those which it has heretofore pressed in this case, urged that the evidence went only to the credibility of the witnesses, not to any fact at issue, and that the

findings of the Board were amply supported by evidence other than the testimony of the witnesses in question. The Court of Appeals denied the motion and affirmed the Board's order. The Supreme Court reversed, holding that the Board (the fact finder in those proceedings as the jury was in this case) had to consider the charges of perjury to make certain that its findings were based on untainted evidence. Delivering the majority opinion, Justice Frankfurter pointed out that the existence of sufficient other evidence was not a valid ground of decision where false testimony was in evidence:

" When uncontested challenge is made that a finding of subversive design by petitioner was in part the produce of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account." Id. at 124-125.

With all deference and respect, we urge that the District Court's decision denying Palmer a new trial rests on the precise rationale that the Supreme Court said was not a sufficient basis of decision, for the District Court stated in its opinion,

"It is therefore the court's opinion that eliminating Hairston's testimony would

still leave other evidence more than sufficient to support the conviction." (Hearing Transcript, 67).

In Mesarosh v. United States, 352 U.S. 1 (1956), the Supreme Court returned to the question of whether different evidence "might have" produced a different result, this time in the context not of an administrative agency case but of a Federal criminal trial before a jury. Petitioners in Mesarosh were convicted of Smith Act violations. While the case was awaiting argument in the Supreme Court, the Solicitor General moved for a remand to the District Court for a determination of the truthfulness of a Government witness, Mazzei, on the grounds that the Government now doubted his testimony since it had learned of testimony by him on similar subjects in other proceedings which it believed to be false. The Supreme Court refused to remand for such a determination. Instead, it ordered a new trial. The Court quoted its statement, set out above, from Communist Party v. Subversive Activities Control Board and went on to point out why a new trial, rather than a remand as requested by the Solicitor General, must follow in the case of a criminal trial when false testimony was on the record:

"There we remanded to the Subversive Activities Control Board for reconsideration of its original determination in the light of the record shorn of the tainted testimony. But there the Board, an administrative agency, was the original finder of

fact. Here, on the other hand, in a criminal case, the original finder of fact was a jury. The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case. Id. at 11-12.

In the light of these decisions, the crucial question of whether a change in the evidence by removal of false testimony might have produced a different result is not an open one. The balance must be struck heavily in favor of the defendant, and a new trial denied only where it is abundantly clear that the change in evidence which would be wrought is insignificant in the context of the trial.

Such is the approach which has been taken by this Court on a related issue where the question of whether a different result "might have" been reached is also determinative, Griffin v. United States, 87 U.S. App. D.C. 172, 183 F.2d 990 (1950). Following affirmance of his conviction for murder, Griffin moved for a new trial on the grounds that the prosecution knew but did not disclose that after the killing the deceased was found with an open pen knife in his pocket, his hand in the pocket though on a pack of cards and not on the knife.⁽⁶⁾ The Supreme Court remanded the case to this Court to determine whether this

⁽⁶⁾The prosecution was not acting in bad faith, since the admissibility of this uncommunicated threat was not then resolved in this circuit.

evidence was admissible, and in so doing said:

"Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." 336 U.S. at 708-709.

This Court thought it would:

"We think it would be too dogmatic.⁴ The appellant is therefore entitled to a new trial."

4. Though the evidence regarding the playing cards in Hunter's hand would, if believed, diminish the significance of the evidence regarding the knife in his pocket, it would not necessarily destroy that significance. Moreover a jury might believe the knife evidence but not the playing-card evidence." 87 U.S. App. D.C. at 174.

Cases from other Circuits dealing squarely with the issue of false testimony are in accord. In Pettine v. New Mexico, 201 Fed. 489 (1912) the Eighth Circuit ordered a new trial in a murder case where a witness for the prosecution who gave evidence bearing on premeditation recanted after trial. The Supreme Court of New Mexico had refused to order a new trial on the ground that there was ample testimony other than that of the recanting witness, so his testimony "could not" have affected the verdict. The Eighth Circuit reversed, phrasing the critical issue in a manner almost identical to that followed by the Supreme Court's decision in Chapman v. California, supra:

"Is it clear beyond doubt that this testimony did not turn the scales against him [the defendant] or remove from the mind of some juror a reasonable doubt of his guilt?" Id. at 494.

In Martin v. United States, 17 F.2d 973 (1927), the Fifth Circuit, though it did not order a new trial because the recanting affidavit was found to have been wholly involuntary, phrased the test as follows:

"In our opinion it is the duty of a trial court to grant a new trial, where a witness at the original trial subsequently admits on oath that he committed perjury, or even that he was mistaken in his testimony, provided such testimony related to a material issue, and was not merely cumulative." Id. at 976.

The Court rejected the "other-sufficient-evidence" argument, stating:

"But we do not think the rule we have stated ought to be so qualified. There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury. . . ." Ibid.

When the structure of the Government's case against Palmer is considered against the background of this body of precedent, it is abundantly clear, we submit, that the test of whether a different verdict might have resulted without Hairston's false testimony is more than adequately met.

A major problem for the Government was that it had no evidence with which to corroborate the bus driver's identification of Palmer as one of the robbers. However, the driver's identification of Balsey was corroborated by Hairston's testimony. So the Government, in effect, put

Baisey on trial too, demonstrated his guilt and then repeatedly linked him to Palmer. Thus, indirectly, the Government was able to provide corroboration of the driver's testimony against Palmer. Nothing more conclusively demonstrates the very real significance of Hairston's testimony to the conviction of Palmer than the constantly repeated efforts of the Government to bring this testimony home against Palmer by linking him to Baisey. The Government's labors to accomplish this end at trial stand in sharp contrast to its contentions on the motion for new trial that Hairston really didn't matter at all.

II

THE GOVERNMENT'S FAILURE TO
DISCLOSE ITS WITNESS'S PRIOR
REPUDIATION OF THE TESTIMONY
HE GAVE AGAINST APPELLANT
REQUIRES A NEW TRIAL

(Trial Transcript, 19-26)
(Hearing Transcript, 37-38)

At the outset, counsel for Palmer wish to emphasize that they make no charge that the Assistant U. S. Attorney who prosecuted Palmer's case knew at the time of trial that Hairston had previously denied the testimony he gave against Palmer. However, it is clear beyond all question that police officers who investigated the bus robbery knew of Hairston's prior repudiation of his testi-

mony. Detectives who investigated the robbery and to whom Hairston gave the statement implicating Baisey were present in the courtroom at Baisey's trial when Hairston testified that he had lied to them. And it was made abundantly clear at Baisey's trial that charges for the same offense were then pending against Palmer. In point of fact, the Juvenile Court Judge asked the prosecutor what the status of Palmer's case was. Under these circumstances, the Government was under a duty to disclose Hairston's repudiation to Palmer's counsel prior to trial.

Recent decisions in this and other Circuit Courts of Appeals establish that the negligent or passive non-disclosure of material evidence useful to the defendant entitles him to a new trial.

Levin v. Katzenbach, 124 U.S. App. D.C. 158,
363 F.2d 287 (D.C. Cir. 1966);

Levin v. Clark, No. 20,682, November 15, 1967,
petition for rehearing en banc denied,
December 16, 1968 (D.C. Cir.);

United States v. Poole, 379 F.2d 645 (7th Cir.
1967);

Ingram v. Peyton, 367 F.2d 933 (4th Cir.
1966);

Barbee v. Warden, 331 F.2d 842 (4th Cir.
1964);

United States v. Consolidated Laundries Corp.,
291 F.2d 563 (2d Cir. 1961).

The Fourth Circuit's decision in Barbee v. Warden, supra, is uniquely in point. In that case, Barbee was convicted of shooting a police officer. At trial, the

prosecution produced a .32 calibre revolver, which Barbee admitted was his, and elicited testimony from witnesses that it was similar to the one used in the shooting. Barbee sought Federal habeas corpus relief on the grounds that the police possessed ballistics and fingerprint tests which cast grave doubt on his involvement in the shooting. For example, the police report showed that one of the bullets found at the scene of the shooting was .38 calibre. Thus the .32 calibre revolver identified as belonging to Barbee was, in a sense, a false witness against Barbee. However, as in the case at bar, there was no showing that the prosecutor knew of the reports and Barbee had never requested disclosure. The Fourth Circuit reversed and ordered Barbee's release if he was not retried in a reasonable time.

Particularly significant to the present case is the Court's discussion of the contention that Barbee was not entitled to relief because there was no evidence that the prosecutor knew of the reports. Chief Judge Sobeloff pointed out that the police, as well as the State's Attorney, were part of the prosecution, and that the prejudice to the defendant was no less because nondisclosure was merely negligent rather than willful:

"Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their

possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." 331 F.2d at 846.

The reason why the prosecutor's knowledge or lack of it is not controlling was pointed out by the Fourth Circuit in the later case of Ingram v. Peyton, 367 F.2d 933, 936 (1966) when it stated that the decisions in this area have shifted their focus from protecting the integrity of the judicial process from misconduct by the prosecutor to "a growing concern with the possible harm to the defendant." This Court has concurred in this reasoning. Levin v. Clark, supra at 4.

As in Barbee v. Warden, the knowledge of the police (as well as the knowledge of the Juvenile Court prosecutor), coupled with the significance of Hairston's testimony, created a duty of disclosure. This duty was irrevocably breached when the Government called Hairston to the stand, while Palmer and his counsel sat helpless, unaware that this witness had previously denied under oath every word of the relevant testimony he was about to give.

That the lack of disclosure prejudiced Palmer hardly seems to require extended comment. As with the recantation issue discussed above, the matter of prejudice is a question of the effect the undisclosed evidence "might

have" had on the trial, Levin v. Katzenbach, supra at 162, 363 F.2d at 291, and is open to plenary review by this Court, Levin v. Clark, supra at 6. Where the undisclosed evidence is significant in the context of the case, the requirement that there be a showing of prejudice is satisfied, even though the nondisclosure was in good faith, Griffin v. United States, 37 U.S. App. D.C. 172, 183 F.2d 990 (D.C. Cir. 1950), was not willful but only negligent, United States v. Consolidated Laundries, 201 F.2d 563 (2d Cir. 1961), or was not known to the prosecutor and not requested by the defendant, Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).

Hairston's testimony was a critical element of the Government's case, an element for which the prosecutor labored diligently to lay a foundation by bringing in Baisey and linking him to Palmer at every turn. It was, in fact, the only corroboration of the complaining witness.

Furthermore, as this Court held in Levin v. Clark, supra, at 11, the significance of the undisclosed evidence must be considered in relation to its effect on the preparation for trial. That consideration is particularly weighty here, where all of the Government's "two-defendant case", involving Baisey as well as Palmer, was built for the use of Hairston's testimony. Hairston's presence as a Government witness would have been questionable, to say the least, had the prosecutor and defense

counsel known of his Juvenile Court testimony. Thus, it is probable that an entirely different case would have been presented, one in which Baisey would not have figured at all and the bus driver's testimony would have gone uncorroborated. In such circumstances, we submit that there is simply no way in which it can be said that in this case the nondisclosure was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

III

APPELLANT HAS BEEN DENIED HIS RIGHT TO A SPEEDY APPEAL

Palmer was taken into custody on or about January 18, 1967,⁽⁷⁾ more than two years ago. He was not tried until October 30, 1967, and not sentenced until January 16, 1968.

Palmer was authorized to proceed on appeal in forma pauperis, and preparation of a transcript of his trial was ordered, on February 21, 1968. There then occurred an extraordinary delay of almost nine months before a transcript of both days of trial was furnished. This delay was traceable only to the Government. It appeared that the Court Reporter for the first day of trial could not be located, nor could his notes. On May 20, 1968, Palmer sought a new trial for this denial of his right to an appeal. The Govern-

⁽⁷⁾ This date does not appear in the record. It was supplied to counsel by an official of the Department of Corrections, Lorton, Virginia.

ment opposed, contending that Palmer could put together a substitute for a trial transcript through interviews with the District Court Judge, witnesses, the Judge's notes, etc. On June 13, 1968, this Court vacated the conviction and remanded for a new trial. Within six weeks of this order, the Government located the missing reporter and moved this Court for reinstatement of the appeal.

The appeal was reinstated on September 19, 1968. Appellant's counsel received the transcript of the first day of trial on November 12, 1968.

Palmer was entitled to a speedy appeal on a full transcript, Hardy v. United States, 375 U.S. 277 (1964); Holmes v. United States, 127 U.S. App. D.C. 332, 383 F.2d 925, 926 (D.C. Cir. 1967). He was denied this right by the Government's failure to provide a transcript until the order of this Court vacating the conviction forced the issue. On the date of this Brief, Palmer has served almost two-thirds of his minimum sentence. In these circumstances, we submit that the Government's delay of his appeal warrants dismissal of the indictment. Cf. Williams v. United States, 102 U.S. App. D.C. 51, 250 F.2d 19 (1957) (seven year trial delay).

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,735

No. 22,581

RECEIVED

AUG 4 1969

CLERK OF THE UNITED
STATES COURT OF APPEALS

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH W. PALMER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

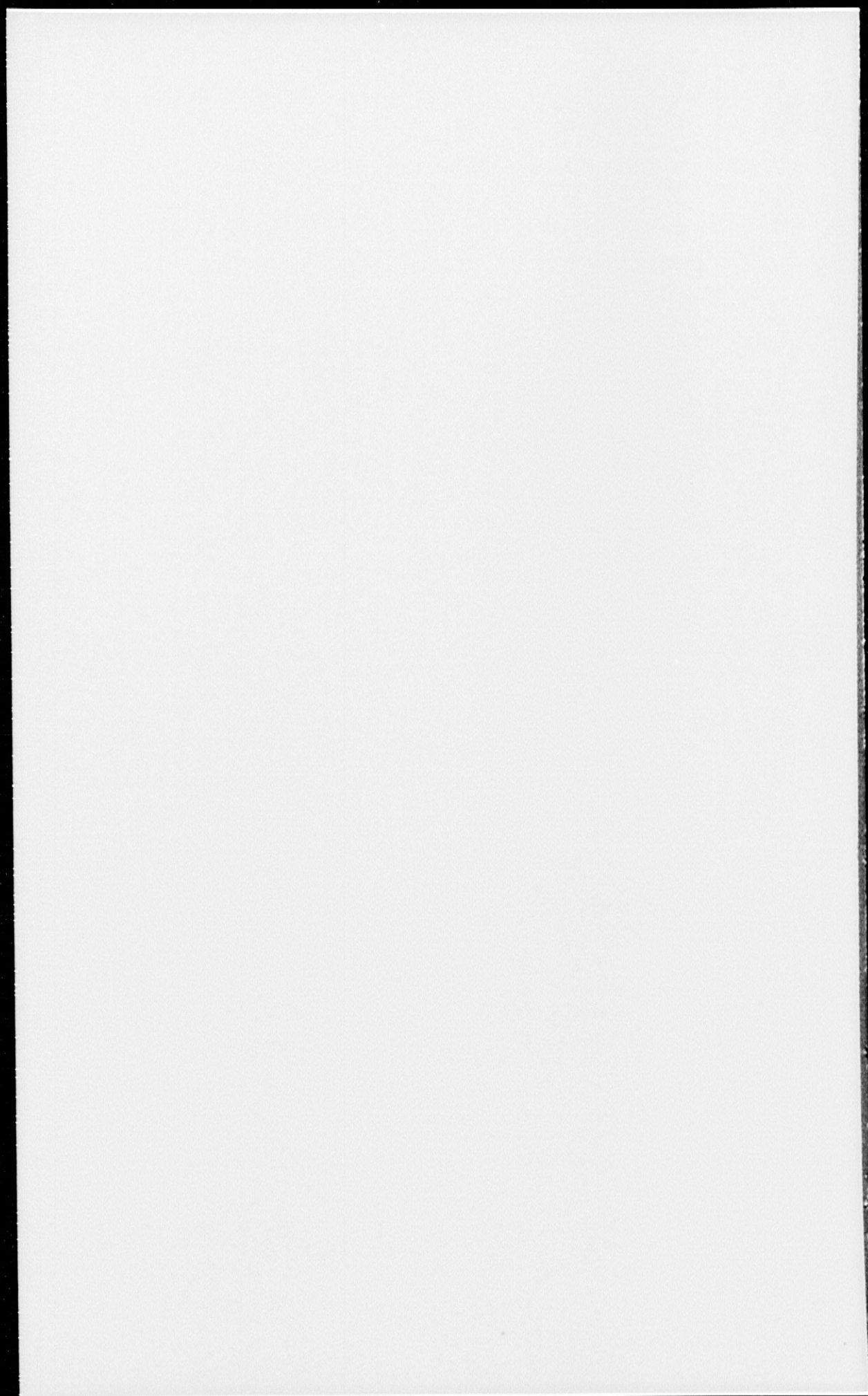
JOHN A. TERRY,
EDWIN K. HALL,
Assistant United States Attorneys.

Ct. No. 266-67

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 4 1969

Nathan J. Perkins
CLERK



INDEX

	Page
Counterstatement of the Case	1
The Government's Case	2
Case For The Defense	4
Post Trial	4
Argument:	
I. The trial court correctly denied appellant's motion for new trial after conducting a hearing and finding that that government witness's allegedly contradictory testimony was not so material that the jury might have reached a different verdict	10
II. The trial court correctly ruled that the government's failure to disclose a prior allegedly contradictory statement by a government witness, of which it had no knowledge, did not entitle appellant to a new trial	13
III. Appellant was in no way prejudiced by the delay which occurred in the preparation of the trial transcript	15
Conclusion	16

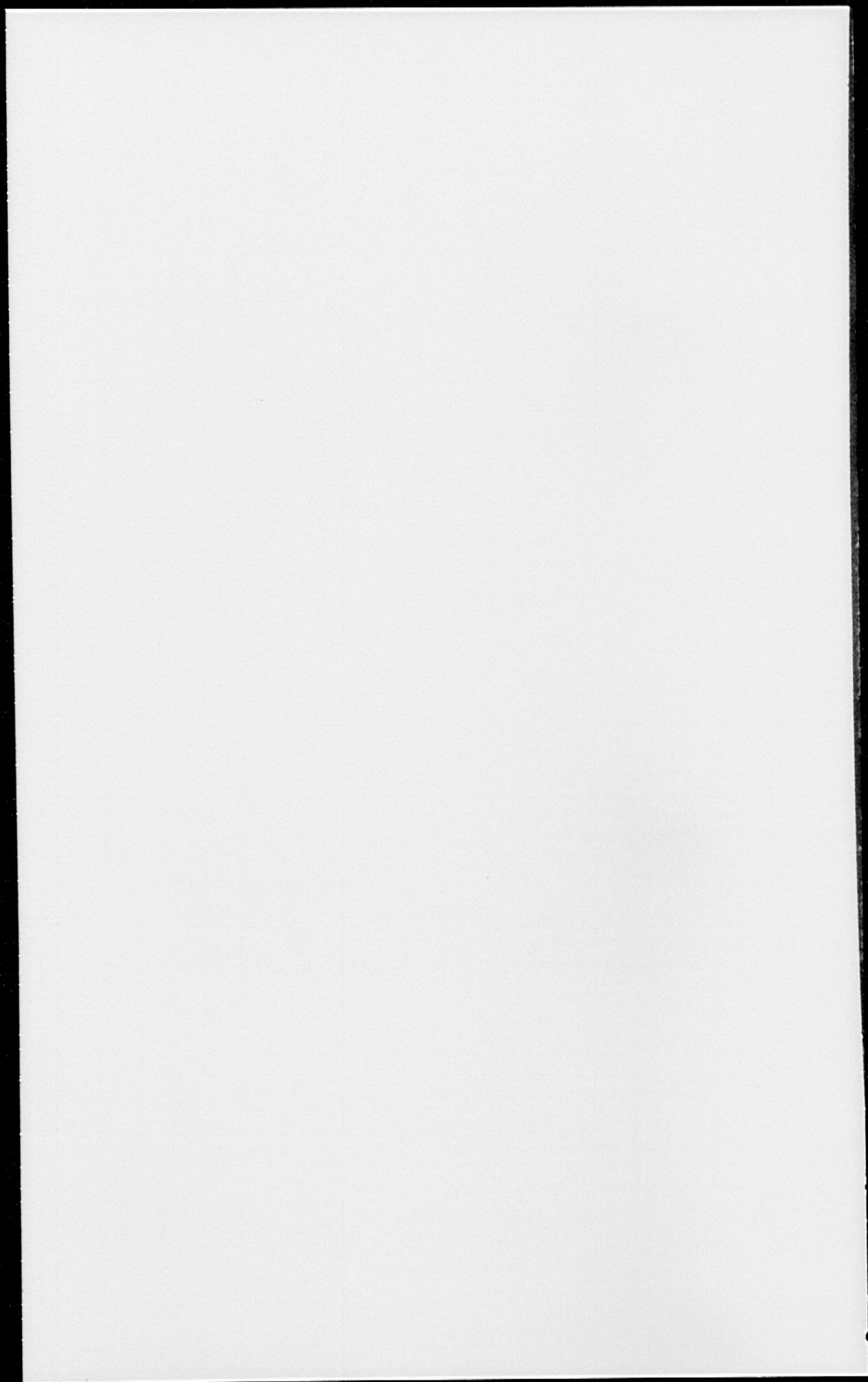
TABLE OF CASES

* <i>Blunt v. United States</i> , — U.S. App. D.C. —, 404 F.2d 1283 (1968), cert. denied, 89 S. Ct. 1021 (1969)	15
<i>Larrison v. United States</i> , 24 F.2d 82 (7th Cir. 1928)	11
<i>Levin v. Katzenbach</i> , 124 U.S. App. D.C. 158, 363 F.2d 287 (1966)	13, 14
* <i>Smith v. United States</i> , 124 U.S. App. D.C. 57, 361 F.2d 74 (1966)	10, 13
* <i>Thompson v. United States</i> , 88 U.S. App. D.C. 235, 188 F.2d 652 (1951)	10, 13
<i>United States v. Johnson</i> , 327 U.S. 106 (1946)	11

OTHER REFERENCES

22 D.C. Code § 502	1
22 D.C. Code § 2901	1

* Cases chiefly relied on are marked by an asterisk.



ISSUES PRESENTED *

In the opinion of the appellee the following issues are presented:

1. Whether the trial court erred in denying appellant's motion for a new trial on a finding that a Government witness's allegedly contradictory testimony was not so material that the jury might have reached a different verdict had they not considered it?

2. Whether the trial court erred in ruling that the government's failure to disclose a prior allegedly contradictory statement by a government witness, of which it had no knowledge, did not entitle appellant to a new trial?

3. Whether appellant was prejudiced by the delay in preparing a transcript of the trial proceedings?

* This case has been before this court on six previous occasions.

- (1) On March 1, 1968, appellant filed a petition for leave to appeal which was dismissed as moot on March 20, 1968 (Miscellaneous Docket No. 3218).
- (2) On March 25, 1968, the appointment of Hugh H. Obear as counsel for appellant was vacated and Ronald E. Madsen was appointed in his place (Docket No. 21,738).
- (3) On June 13, 1968, this Court vacated the judgment for conviction and remanded for a new trial (Docket No. 21,738).
- (4) On September 19, 1968, this Court vacated its order of June 13th and reinstated the appeal (Docket No. 21,738).
- (5) On October 31, 1968, this court denied appellant's renewed motion for bail, without prejudice to the filing of a subsequent motion on further allegations.
- (6) On November 1, 1968, this Court denied a motion for production of certain Juvenile Court Records (Docket No. 21,738) and affirmed an order of the District Court denying a similar motion there, without prejudice to the filing of a motion for new trial and a new motion for production of the Juvenile Court Records (Docket No. 22,388).



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,738

No. 22,881

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH W. PALMER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed March 7, 1967, appellant was charged with robbery and assault with a dangerous weapon.¹ At trial on October 30-31, 1967, before United States District Court Judge Richmond B. Keech, sitting with a jury, appellant was found guilty on both counts and on January 12, 1968 received a concurrent sentence of thirty to ninety months on both counts.

¹ In violation of 22 D.C. Code §§ 2901 and 502.

The Government's Case

In the morning of December 15, 1966, Mr. William Trust, a busdriver for D. C. Transit, was approaching Georgia and Eastern Avenues from the Silver Spring bus terminal when two young men about 20 years of age boarded the bus (Tr. 3-5). When they got on the bus and paid their fare the first man walked to the rear of the bus, checking the seats, and then returned to the front and sat in the number one seat facing the front of the bus on the right-hand side (Tr. 5-6). The second man took the second seat facing the front on the right side of the bus upon boarding (Tr. 6). As the bus proceeded down Georgia Avenue picking up passengers Mr. Trust had occasion to observe the young men from time to time through the rear view mirror, which was in line with where they were sitting (Tr. 6).

When the bus stopped at Sixth and I Streets, Southwest, approximately thirty minutes after picking up the two young men, the last passenger, with the exception of the two men, got off the bus (Tr. 7). As the bus was nearing the end of its run one of the two men pulled the cord to get off and the bus stopped at the Delaware Avenue bus stop (Tr. 7-8). As the bus was approaching its stop the two men had left their seats and gone to the front of the bus where the taller one faced Mr. Trust, the driver, with a gun in his right hand and said "This is it, I want all your money." (Tr. 7-8). The second man was behind the one with the gun with one foot on the top level of the bus and one in the stairwell (Tr. 8).

Mr. Trust unlocked the cash box on the dash of the bus and put the money in his supply box on the floor next to his seat (Tr. 8). At that point the man with the gun took the change carrier, reached in Mr. Trust's right inside pocket with his left hand and took a folder containing four or five dollars (Tr. 8-9). He then picked up the supply box, at which point Mr. Trust opened the door (Tr. 9-10). Mr. Trust testified this all took approximately one to three minutes (Tr. 11).

Mr. Trust described the gun which one of the men carried as follows: "the gun was a small gun with a black barrel, about so long . . . approximately two or three inches long. To my knowledge it was not an automatic, because in an automatic you do not see the chambers. This had revolving chambers." (Tr. 10).

After Mr. Trust opened the door the two men jumped off and ran behind the bus on the right side (Tr. 10). After waiting two or three seconds Mr. Trust jumped off and went around the front of the bus where he saw the men run north on Delaware Avenue and enter a building at 203 N Street, Southwest (Tr. 10-14). As of December 15, 1966 appellant's mother was living at 203 N Street, Southwest in the District of Columbia (Tr. 19).

Mr. Trust described the man with the gun as being "approximately five-foot eight or ten, wearing dark black leather coat, black civilian hat, dark trousers, was dark complexioned" (Tr. 13); and the second man as "light complexioned, weight approximately 140-150 pounds, approximately . . . five-foot six or eight inches. He had on a red plaid jacket with either a tan or light brown sweater or shirt." (Tr. 13).

Mr. Trust identified Charles Baisey as one of the two men who robbed him at a lineup five days later on December 20, 1966 (Tr. 15-16). On January 18, 1967 Mr. Trust saw appellant in a courtroom of the Court of General Session, whom he identified as the shorter of the two men who robbed him (Tr. 16-17, 29-30). At the trial Mr. Trust identified appellant as being the second of the two men who robbed him (Tr. 17), and as the man he had previously identified in a courtroom of the Court of General Sessions (Tr. 17). Appellant's counsel declined cross-examination of Mr. Trust (Tr. 18).

Mr. David Hairston testified he knew Charles Baisey whom he had been introduced to appellant by, who lived at 1200 Delaware Avenue, Southwest (Tr. 21-22). He testified he was at Baisey's house early Thursday morning, December 15, 1966 where he saw some bus tokens (Tr. 23) which Baisey tried to sell to Hairston (Tr. 25).

Case For The Defense

Miss Alfrieder Walters, appellant's girlfriend, testified she had known appellant about three years (Tr. 35), and that on December 9, 1966 she went to the bus station with appellant, gave him money to buy a bus ticket for New York and saw him leave for New York on the bus (Tr. 35-36). She testified that appellant returned from New York New Year's night.

On cross examination Miss Walters said the appellant had been spending a lot of time at 1200 Delaware Avenue, Southwest, just across from his mother's house at 203 N Street, where he also visited occasionally (Tr. 41, 46). At this time appellant was living at the 700 block of Howard Street, Southeast (Tr. 41). No one other than Miss Walters knew appellant was going to New York before he left (Tr. 51). She also testified that appellant's mother had also gone to New York for the Christmas holidays, but didn't come back until after appellant did, after January 1. (Tr. 62).

Mrs. Mary Palmer, Appellant's mother, testified that she lived at 203 N Street, S.W. (Tr. 3, 10/31), and that she went to visit her sister in New York the day before Christmas and saw appellant who had been there for quite a while previously (Tr. 4, 10/31). She testified she did not know the exact date he had arrived in New York (Tr. 6, 10/31), but that he was in New York when she left to return to Washington on December 26 or 27 (Tr. 6, 10-11, 10/31).²

Appellant testified he went to New York on December 9, 1966 (Tr. 18, 10/31) to visit his aunt for the Christmas holidays, and stayed there about three weeks, returning December 31 (Tr. 19, 10/31).

Post Trial

On March 27, 1968 the clerk of this court informed appellant's counsel that officials of the District Court had

² This appears to contradict Miss Walters' testimony that appellant's mother returned to Washington after appellant did (Tr. 62).

been unable to locate the court reporter who had transcribed the first day of trial. On May 20, 1968, appellant filed with this court a motion for summary reversal and release pending retrial (Motion for New Trial and Bail) on the ground that no transcript for the first day of his trial had been made available. By order of June 13, 1968 this court vacated appellant's conviction and remanded the case for retrial; which order of remand was vacated by this court on September 19, 1968 because said court reporter had been found.

On September 5, 1968 appellant moved the District Court for the production of the records of the District of Columbia Juvenile Court in the trial of one Charles Sydney Baisey, who was the alleged accomplice of appellant in the crime for which appellant was convicted. Appellant claimed he had received information subsequent to his conviction that a witness by the name of David Hairston, who had testified for the Government at appellant's trial, had made or given a signed statement to the Juvenile Court during Baisey's trial which contradicted the testimony given by Hairston at appellant's trial. The District Court denied appellant's motion on September 20, 1968 and on September 27, 1968 appellant so moved this court; which denied appellant's motion on November 1, 1968 without prejudice to the filing in the District Court of a motion for new trial and a motion for production of the Juvenile Court records.

After similar motions before the District Court and this court, noted above, appellant filed on December 9, 1968 in the District Court for the District of Columbia a motion for a new trial and the production of the Juvenile Court records of the trial of Charles Baisey, appellant's accomplice in the bus robbery. Appellant alleged that one David Hairston, who had testified for the Government at appellant's trial, had given contradictory testimony at the Juvenile Court hearing. On February 14, 1967 a hearing was held before Judge Richmond Keech.

David Hairston testified at the February 14 hearing that, upon being questioned by the police on ap-

proximately December 15, 1966 about the bus robbery, he told them he went to Charles Baisey's house to pick up his brother to go to school (Tr. 33, 2/14/69). He told the police he did not see any bus tokens at the apartment, but did see a little gray case and an inch and a half paper-roll case (Tr. 33-34, 2/14/6). Hairston said he did not tell the police that Baisey offered to sell him the roll, did not tell the police that Baisey had robbed a bus, and did not tell the police that Baisey had tried to sell him any bus tokens (Tr. 34-35, 2/14/69).

Hairston did not remember actually testifying at the Juvenile Court hearing or telling the judge he had seen Baisey with any bus tokens (Tr. 36, 2/14/69). Hairston testified he had signed a statement which was to be used in the Juvenile Court proceeding which said he had told the police that Baisey had the bus tokens. He testified that he did not say in the statement that he had previously told the police Baisey had robbed a bus and that this fact was not true (Tr. 36-37, 2/14/69).

The following statement was read to Hairston from the Juvenile Court proceedings:

"I, David Hairston, 1200 Delaware Avenue, Southwest, made this statement of my own free will that I told the police, 'Lucky Baisey told me he robbed a bus and I told them that Lucky tried to sell me tokens on December 15, 1966.'

"This was not true and I did it because I was very mad at Lucky because he would not give me back my shoes. I am very sorry that I have got Lucky in so much trouble.

"Mr. French asked me to very kindly to make this statement and I made the statement from my own free will, March 16, 1967". (Tr. 37-38, 2/14/69).

Hairston testified he had signed the above statement but that it was not true, in that Lucky did not tell him he robbed the bus and did not try to sell him any tokens. "The only thing that was true is from up in his house I saw a few of those tokens in the front living room on the coffee table" (Tr. 38-39, 2/14/69). Hairston testified that he had told the police that Lucky had told him he had

robbed a bus and that that portion of the statement was true (Tr. 39, 2/14/69). He also said he told the police Baisey had tried to sell bus tokens to him, but that this was not true (Tr. 39, 2/14/69).

Upon being read his testimony at appellant's trial, Hairston said he did not see Baisey with a roll of tokens, contrary to his actual trial testimony, that Baisey did not try to sell them to him, contrary to the actual trial testimony, *but* that Baisey had told him that he had robbed a bus (Tr. 42-44, 2/14/69).

On cross examination, Hairston testified that he saw one or two rolls, which looked like dime rolls, on Baisey's coffee table, though not on Baisey himself, and that when Baisey told him he had robbed a bus Hairston assumed the roll or rolls were bus tokens (Tr. 44, 46, 2/14/69). He further testified that he could not actually remember and was confused as to whether Baisey tried to sell him any tokens (Tr. 46, 47, 2/14/69).

After hearing arguments of counsel, the court made the following ruling set out in part below:

"This is the second hearing on motion for new trial and ancillary relief. . . . pursuant to motion of defendant for inspection in camera of legal and social records in the Juvenile Court relating to the matter of Charles Sidney Baisey, Docket No. 67-00290J, this court obtained said records and examined the same and found no affidavit of David Hairston. There is nothing in the two files indicating that by affidavit or otherwise the said Hairston changed the statement he made to the police. The Juvenile Court found the defendant Baisey to be "involved". Transcript of the proceedings relating to Baisey had not been written up, but was to be and sent to this court for examination.

On January 6, 1969, defendant Palmer was brought up for hearing, with all interested parties present. During the hearing the court advised counsel that the records, social and legal, of the Juvenile Court relating to Baisey had been received and examined by the court and that neither disclosed the presence of

or reference to an alleged affidavit of Hairston, and that in addition an examination by an official of the Juvenile Court had failed to disclose the alleged affidavit or reference thereto. This court was advised by Juvenile Court that the only other source from which the matter of affidavit could be obtained would be the transcript of the hearing involving Baisey. Such transcript was requested and has been made available to all counsel for examination. The transcript reveals that the witness Hairston made a statement to police involving Baisey, and then at the Juvenile Court hearing of June 1, 1967, recanted at least part, assigning as reason that Baisey had borrowed his shoes and not returned them. The transcript further shows that Baisey was found by the Juvenile Court to be "involved", notwithstanding the recantation in part by Hairston of a statement by him to the police. In this connection the Juvenile Court said: "The court believes from very substantial amount of the evidence that you (Baisey) were the person who robbed the bus driver It believes it more cogent to find that the original statement of Hairston is true and his recanting of it here is not true. So, I do not think on the basis of that, that he gave a false statement to the police' (Juv. Ct. Tr. 59)"

The witness David Hairston was called and has testified at the instance of counsel for the defendant Palmer. As characterized by Mr. Madsen, attorney for defendant Palmer, not too much help was gained by him from the testimony. It does, nevertheless, at least tend to set forth certain inconsistencies between the witness's statement to police, his statement used at the Juvenile Court, and the testimony here offered. It was not clear-cut.

Counsel for the defendant has, in the hearing today, raised the issue of failure of the prosecuting authorities to make known what transpired at the Baisey trial with reference to the witness Hairston.

The defendant Palmer was not in custody prior to his trial, having been released on bond. The defend-

ant Palmer knew Baisey and also the witness Hairston.

Counsel cites the *Brady* case and related cases as authority for requiring a new trial as a consequence of the defendant Palmer's counsel not being advised. Defense counsel very honorably sets at rest any charge so far as the District Attorney's office is concerned. The record in this case shows that the Assistant United States Attorney who tried the Palmer case was without any knowledge of what transpired with reference to the witness Hairston until the filing of the motion for new trial by counsel for Palmer. Under the facts of record it is the opinion of this court that this situation is not controlled by the *Brady* and related cases. It is significant to note that the testimony of Hairston in the Palmer trial in this court, to the limited extent used, conformed to the statement made by him originally to police and possessed by the District Attorney. There was no reason for the latter to have known of what transpired in Juvenile Court, nor for him to have checked there. In its determination that defendant Palmer is not entitled to a new trial on the basis of newly discovered evidence under applicable law and the evidence in this case, the court has proceeded on the premise that such part of the statement made by Hairston to the police as was used in Palmer's case was false.

There was abundant evidence on which the jury could find the defendant guilty of robbery and assault with a dangerous weapon without resorting to the limited testimony of Hairston to the effect that he saw Baisey the next day with bus tokens. At most, such evidence would have been merely a cumulative circumstance or usable for impeachment purpose. It is therefore the court's opinion that eliminating Hairston's testimony would still leave other evidence more than sufficient to support the conviction. It is further the court's judgment that the elimination *in toto* of the witness Hairston's testimony could not have caused the jury to reach a different verdict. His testimony was *not* "so material" that the jury *might* have reached a different verdict. See *Larrison v. U.S.*, 24

F.2d 82; *U.S. v. Johnson*, 142 F.2d 588, 591; and *United States v. Rutkin* 208 F.2d 697. This court, under the facts in this case, does not find the opinion of the Supreme Court in *Mesarosh v. United States*, 352 U.S. 1, to be controlling.

For these reasons defendant's motion for a new trial on the basis of newly discovered evidence is denied." (Tr. 63-67, 2/14/69).

On April 9, 1969 this court granted appellant's motion to consolidate his appeal from the judgment of conviction (Docket No. 21,738) with his appeal from the District Court's order denying his motion for a new trial (Docket No. 22,881).

ARGUMENT

- I. The trial court correctly denied appellant's motion for new trial after conducting a hearing and finding that the government witness's allegedly contradictory testimony was not so material that the jury might have reached a different verdict.

(Tr. 5-7, 13, 15-17, 19, 21-22, 25; Tr. 2/14/69, 38-47, 63, 65-67)

At the request of appellant the trial court held a hearing to determine whether a prior allegedly contradictory statement by David Hairston, a government witness, would, if it rendered Hairston's trial testimony false, be so material that the jury might have reached a different verdict if it had been aware of it, thereby necessitating a new trial.

This court has often held that a denial of a motion for a new trial should not be disturbed on appeal except for an abuse of discretion or an erroneous application of law. *Smith v. United States*, 124 U.S. App. D.C. 57, 361 F.2d 74 (1966); *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). Also, the Supreme Court has said that "while the appellate court might intervene when the findings of fact are wholly unsupported by evidence . . . it should never do so where it does not clearly appear

that the findings are not supported by any evidence." *United States v. Johnson*, 327 U.S. 106, 111-112 (1946). We feel there has been neither an abuse of discretion nor an erroneous application of law in this case, and that the trial court's denial of appellant's request for a new trial, after a full hearing, should be affirmed.

Before making its ruling, the trial court stated that it accepted "the premise that such part of the statement made by Hairston to the police as was used in Palmer's case was false." (Tr. 66, 2/14/69)³ The trial judge ruled as follows:

There was abundant evidence on which the jury could find the defendant guilty of robbery and assault with a dangerous weapon without resorting to the limited testimony of Hairston to the effect that he saw Baisey the next day with bus tokens. At most, such evidence would have been merely a cumulative circumstance or usable for impeachment purpose. It is therefore the court's opinion that eliminating Hairston's testimony would still leave other evidence more than sufficient to support the conviction. It is further the court's judgment that the elimination *in toto* of the witness Hairston's testimony could not have caused the jury to reach a different verdict. His testimony was not 'so material' that the jury might have reached a different verdict. (Tr. 66-67, 2/14/69).

The trial judge correctly directed his inquiry as to whether a new trial should have been granted to whether the jury might have reached a different conclusion had the "recanted" testimony not been before the jury. *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928). The

³ The record does not reveal a prior "repudiation" as such of testimony given against appellant by Hairston, but rather evidences of contradiction, confusing at best. In fact, Hairston's testimony at the hearing was in itself contradictory (Tr. 38-47, 2/14/69).

Hairston testified at appellant's trial that he saw some bus tokens at Baisey's house (Tr. 23) which Baisey tried to sell to him (Tr. 25). The record shows Hairston *did* see what he assumed to be bus tokens at Baisey's (Tr. 44-46, 2/14/69), but he was confused as to whether Baisey had actually tried to sell him any (Tr. 46-47, 2/14/69).

record in this case fully supports the trial judge's determination that more than sufficient evidence of guilt existed upon which the jury could base its verdict, notwithstanding the Hairston testimony.

First of all, of the two important pieces of information which emerged from Hairston's trial testimony, i.e. that he had seen bus tokens, and that Baisey had tried to sell them to him, only the latter appeared to be contradicted, and then hesitantly (Tr. 46-47, 2/14/69).⁴

Secondly, the bus robbers were observed by the bus driver during the day-light hours over a period of approximately thirty minutes through his rear-view mirror as they sat in the first and second seats facing the front of the bus, directly in line with the mirror (Tr. 5-7). Aside from having excellent opportunity to observe the robbers, the bus driver was detailed in his description of appellant as "light complexioned, weight approximately 140-150 pounds, approximately . . . five feet six or eight inches. He had on a red plaid jacket with either a tan or light brown sweater or shirt" (Tr. 13). The bus driver made a positive identification of appellant as one of the robbers at the trial (Tr. 17).⁵

Finally, there was a substantial amount of circumstantial evidence to support appellant's guilt. The bus driver saw the two robbers escape into 203 N Street, S.W., where

⁴ Because of the confusing nature of the contradictory elements of all testimony given by Mr. Hairston, the government does not contest the trial judge's *premise* that Hairston's statements to the police used at appellant's trial were false (Tr. 66, 2/14/69). The trial judge, however, did not appear to make an explicit *finding* of falsity, as alleged by appellant (B. 23), apparently because he felt Hairston's testimony at the hearing gave him little assistance in making such a determination (Tr. 65, 2/14/69). Should this court decide the jury might have reached a different conclusion without the allegedly recanted testimony, then this case should be remanded to determine (a) exactly what was recanted and (b) whether part or all of the testimony given at appellant's trial by Hairston was *in fact* false.

⁵ Appellant's counsel did not elect to cross examine the bus driver, apparently feeling that to do so would harm rather than help his client.

it was stipulated at trial that appellant's mother lived (Tr. 19). Also, Baisey, the person identified by the bus driver as the robber with the gun (Tr. 15-16), and who was found by the Juvenile Court to have been "involved" in the robbery (Tr. 63, 2/14/69), lived only a block away from 203 N Street, S.W. and was a cousin and good friend of appellant's (Tr. 21-22). We feel the above record fully substantiates the trial court's ruling which should consequently not be disturbed on appeal.

II. The trial court correctly ruled that the government's failure to disclose a prior allegedly contradictory statement by a government witness, of which it had no knowledge, did not entitle appellant to a new trial.

(Tr. 2/14/69, 66-67)

Appellant argues that the government's failure to disclose an alleged prior recantation or contradiction of the testimony of David Hairston, a witness for the government at appellant's trial, entitles him to a new trial. The trial court, after holding a hearing, refused to grant a new trial. This ruling should be affirmed as there is nothing in the record to suggest either an abuse of discretion or an erroneous application of the law. *Smith v. United States*, 124 U.S. App. D.C. 57, 361 F.2d 74 (1966); *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

Appellant argues that there occurred a negligent or passive non-disclosure of material evidence useful to appellant which entitles him to a new trial under *Levin v. Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966) and other similar cases cited in appellant's brief. This claim is not supported by the record, and the trial court so found in its explicit holding that the government had no knowledge or reason to have knowledge of the alleged prior contradictory testimony (Tr. 66 2/14/69).⁶

⁶ The trial judge's ruling was as follows:

The record in this case shows that the Assistant United States Attorney who tried the Palmer case was without any

In *Levin, supra* the court said relief would be granted "if the government failed to disclose evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt. Such a failure may be classified as negligence" *Id.* at 162. In that case the court remanded to determine whether the non-disclosure of information in the possession of the government, and previously requested by appellant in that case, was negligent. Not only did the trial court in this case find that the government did not have knowledge of the prior testimony (Tr. 66 2/14/69), unrequested by appellant, but the nature of the alleged contradictions are of such a confusing and dubious nature that were the government to be charged with the knowledge it would not appear that such a "complete recantation" as appellant alleges actually took place.⁷

Furthermore, the government feels that the disclosure of what partial recantation as might have taken place, would not have been such as "might have led the jury to entertain a reasonable doubt about appellant's guilt." *Levin, supra* at 162. The record shows that Hairston's testimony was a small portion of the government's case along-side a positive and unchallenged eyewitness identification of appellant, which, together with substantial circumstantial evidence (see Argument I of the brief, *supra*), fully supports the trial court's ruling that "the elimination *in toto* of the witness Hairston's testimony could not have caused the jury to reach a different verdict. His testimony was not so material that the jury might have reached a different verdict" (Tr. 66-67, 2/14/69).

knowledge of what transpired with reference to the witness Hairston until the filing of the motion for new trial by counsel for Palmer. . . . It is significant to note that the testimony of Hairston in the Palmer trial in this court, to the limited extent used, conformed to the statement made by him originally to police and possessed by the District Attorney. There was no reason for the latter to have known of what transpired in Juvenile Court, nor for him to have checked there. (Tr. 66, 2/14/69).

⁷ See Footnote 3 *supra*.

III. Appellant was in no way prejudiced by the delay which occurred in the preparation of the trial transcript.

Appellant was sentenced on January 12, 1968. On January 16, 1968 appellant's application to appeal in forma pauperis was denied without prejudice. On February 23, 1968 appellant filed a letter in the nature of a motion to proceed on appeal and the District Court ordered preparation of trial proceedings at expense of the Government. On March 27, this court entered an order appointing appellant's present counsel. On May 3, 1968 a transcript of proceedings for October 31, 1967, pages 1-39, was filed; approximately two months after appeal was docketed. On November 26, 1968 the transcript of proceedings of October 30, 1967 was filed; this being approximately nine months after appeal was docketed. The delay between the filing of the first transcript and the second was apparently due to the inability to find the court reporter.

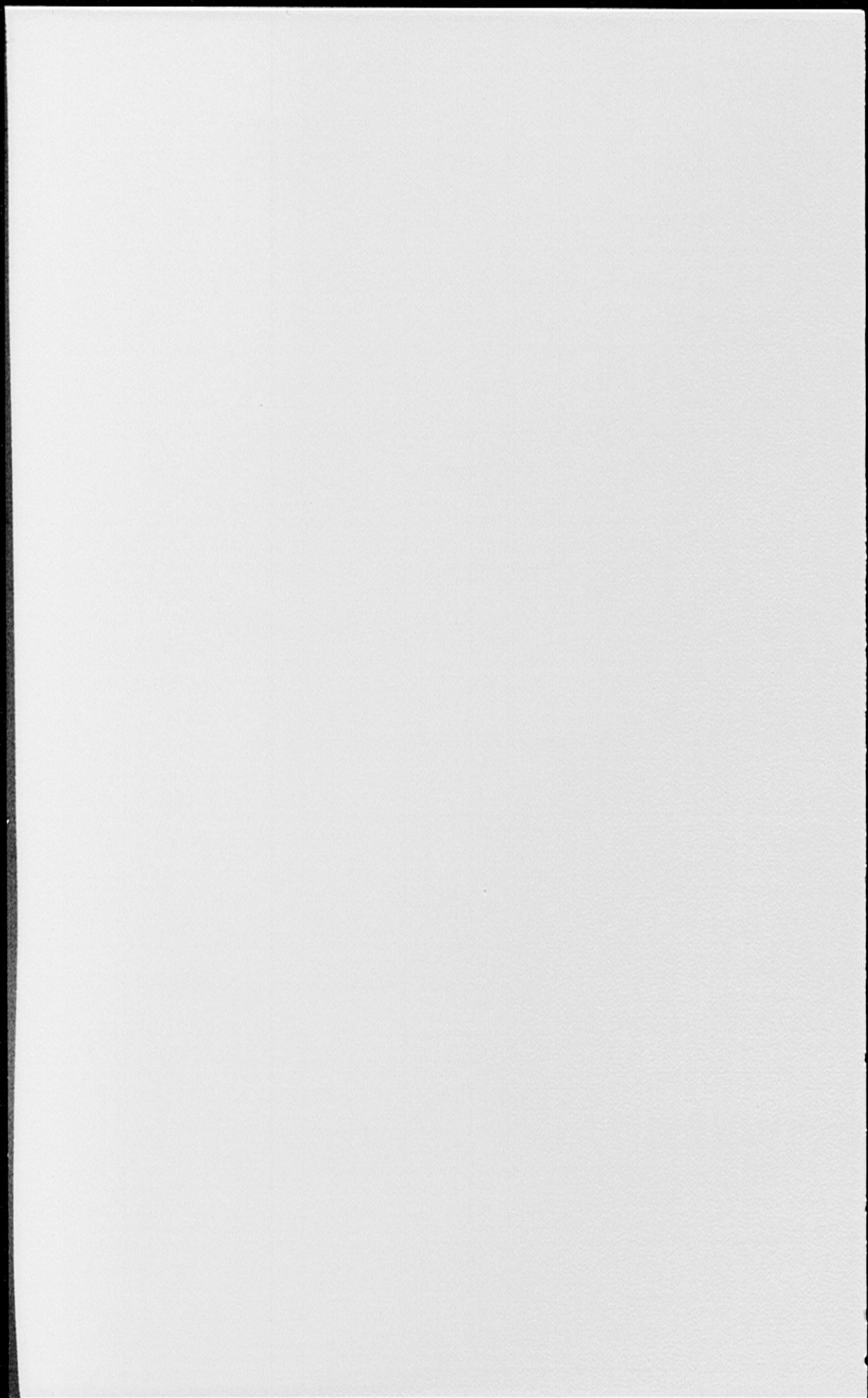
Although a delay of some nine months occurred in the preparation of trial transcripts, appellant was not in any way prejudiced by the delay. Since he has not yet served his minimum sentence, and his conviction is a valid one, appellant has suffered no "unnecessary detention or collateral disadvantage" because of the delay. *Blunt v. United States*, — U.S. App. D.C. —, 404 F.2d 1283, 1290 (1968), *cert. denied*, 89 S.Ct. 1021 (1969). Furthermore, appellant has not presented any evidence to suggest he has been prejudiced in bringing this appeal because of the delay. Accordingly, appellant's conviction should not be reversed. *Blunt v. United States*, *supra*.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
EDWIN K. HALL,
Assistant United States Attorneys.



REPLY BRIEF FOR APPELLANT

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH W. PALMER, JR.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee,

and

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH W. PALMER, JR.,
Appellant.

Docket No. 21,738

Docket No. 22,881

Appeals From The United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 14 1969

Nathan J. Paulson
CLERK

RONALD E. MADSEN
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(Appointed by this Court)

TABLE OF CONTENTS

Argument	1
1) Hairston's Testimony	1
2) The Materiality of Hairston's Testimony	3
3) Nondisclosure of Hairston's Juvenile Court Testimony	5
4) Disposition	6
Conclusion	7

TABLE OF CASES

<u>Barbee v. Warden</u> , 331 F.2d 842 (4th Cir. 1964)	5
<u>Chapman v. California</u> , 386 U.S. 18 (1967).	4
<u>Communist Party v. Subversive Activities Control Board</u> , 351 U.S. 115 (1956).	4
<u>Fahy v. Connecticut</u> , 375 U.S. 85 (1963).	4
<u>Mesarosh v. United States</u> 352 U.S. 1 (1956)	4

ARGUMENT

The Government's brief on this appeal places its main emphasis on three contentions: (1) that Hairston's testimony before, during and after Palmer's trial is essentially consistent, though perhaps somewhat confusing; (2) that there was sufficient evidence apart from Hairston's testimony to sustain the conviction and, (3) that since the Assistant United States Attorney who prosecuted Palmer did not know about Hairston's Juvenile Court testimony, there was no breach of the Government's duty to disclose evidence favorable to the accused.

1) Hairston's Testimony.

It is somewhat difficult to imagine a clearer recantation by a witness than that which appears of record in this case. At Palmer's trial, David Hairston testified that on the morning of December 15, 1966 he saw "Lucky" Baisey with a roll of bus tokens and Lucky tried to sell them to him. At the subsequent hearing on the motion for a new trial, this testimony was read to him, word for word. He then unequivocally denied it.

(Reading to the witness:)

" 'Q When you went there that particular morning did you see Lucky?

'A Yes, I did.

'Q Did you have any dealings with him?

'A Yes, I talked to him.

'Q What happened?

'A Well, I seen him with a roll of tokens.

'Q You mean bus tokens?

'A Yes.'

"Q Did you see Mr. Baisey with a roll of tokens at that time?

"A No, I did not.

"Q Again picking up the testimony,

'Q What did Lucky try to do with the bus tokens, if anything?

'A He tried to sell them.

'Q To you?

'A Yes.'

"Q Is that correct?

"A No, sir. No, sir."

(Hearing transcript, 42-43)

At no time during the hearing on the motion for a new trial was the question of the truthfulness of his testimony at Palmer's trial more clearly presented to Hairston. At no time during the hearing was he less subject to possible confusion from the form of the question put to him or to

loading from suggestions contained in the questions themselves. The fact that David Hairston may at some points in the hearing have misunderstood a question, or that he may have responded quite readily to suggested explanations as to what he really meant, cannot gloss over his flat statement, under oath, that the testimony which was just read to him was not true.

In view of this express recantation, the question which is posed here is whether his testimony at Palmer's trial was material enough in the context of the case that the jury might have reached a different conclusion without it.

2) The Materiality of Hairston's Testimony.

The Government agrees with appellant that the test just stated is applicable in this case.⁽¹⁾ (Brief for Appellee, Argument, Point I, page eleven). However, we respectfully submit that the Government has misconstrued this test when it argues that there was sufficient other evidence to sustain the verdict, for this is precisely the rationale that the Supreme Court has held to be improper

⁽¹⁾ It would appear that the Government agrees that the other two elements of the Larrison test have been met, and it raises no challenge as to them.

in both Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956), and Mesarosh v. United States, 352 U.S. 1 (1956), as discussed in appellant's main brief, pages 26-29. Furthermore, such an argument also disregards the Supreme Court's decisions in Chapman v. California, 386 U.S. 18 (1967) and Fahy v. Connecticut, 375 U.S. 85 (1963). Significantly, the Government does not in any way challenge the impact of these Supreme Court decisions on the case at bar. In view of the fact that Hairston's testimony was the only corroboration of the bus driver, it can scarcely be said that there was not "a reasonable possibility" that Hairston's testimony "might have contributed to the conviction" (Fahy v. Connecticut, 375 U.S. at 86-87) or that the introduction of this testimony was "harmless beyond a reasonable doubt" (Chapman v. California, 386 U.S. at 24.) Moreover, even the naked phrasing of the Larrison test, considered without the undeniable impact of the Mesarosh and Communist Party decisions, suggests that a new trial should be granted where all corroboration of the prosecution witness is, or would have been, removed and the trial left as a one-to-one credibility match. Though the driver testified as to his ability to observe the men who robbed him, and where they went when they left the bus, it is plain that he cannot be deemed to corroborate himself by his own testimony.

3) Nondisclosure of Hairston's Juvenile Court Testimony.

Appellee contends in point II of its argument that the Government was under no duty to disclose Hairston's Juvenile Court testimony because the Assistant United States Attorney had no knowledge of it, and, so it is contended, no reason to know of it because Hairston's original statement to the police conformed to his testimony against Palmer. Counsel for appellant respectfully submit that this argument simply fails to come to grips with the fact that police who investigated the bus robbery were present when Hairston's testimony was taken before the Juvenile Court. It was the Federal Government that prosecuted Palmer, not just one Assistant United States Attorney, and the police are certainly no less a part of the Government, and its prosecution team, than the Government attorney who carries the case through the last stage, in court. Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1966). We submit that it was the Government which was responsible for placing Hairston on the stand, that it was the Government which, in one of its branches, knew of Hairston's prior testimony, and that it was the Government which placed before the jury his testimony, every relevant word of which he had previously denied under oath. Certainly, the effect on Palmer was no less because the source of nondisclosure was the failure of the Government to get the information to the prosecutor rather than a

decision by the prosecutor not to reveal something he knew.

We submit that when the United States places a witness on the stand to convict a man of a serious felony, it is responsible for knowing that less than five months previously, in another District of Columbia criminal court, in the trial of defendant's alleged accomplice in the same offense, its witness has denied under oath the very testimony he is about to give.

4) Disposition.

Almost two years have passed since Palmer was convicted. At the date of this brief, he has less than eight months to serve on his minimum sentence. Nine months of delay is attributable to the Government's failure to provide a full record. The appeal has been postponed another month due to the heavy case load of the Appellate Division of the United States Attorney's office, necessitating a month's extension in the briefing schedule. Regardless of whether he has suffered prejudice in the technical sense or not, Palmer was entitled to a speedy appeal. It is hardly appropriate for the Government, having occasioned a lengthy delay, to request that this case be sent back, once more, to the trial court for yet another determination should this Court conclude, as we submit it should, that Hairston's testimony

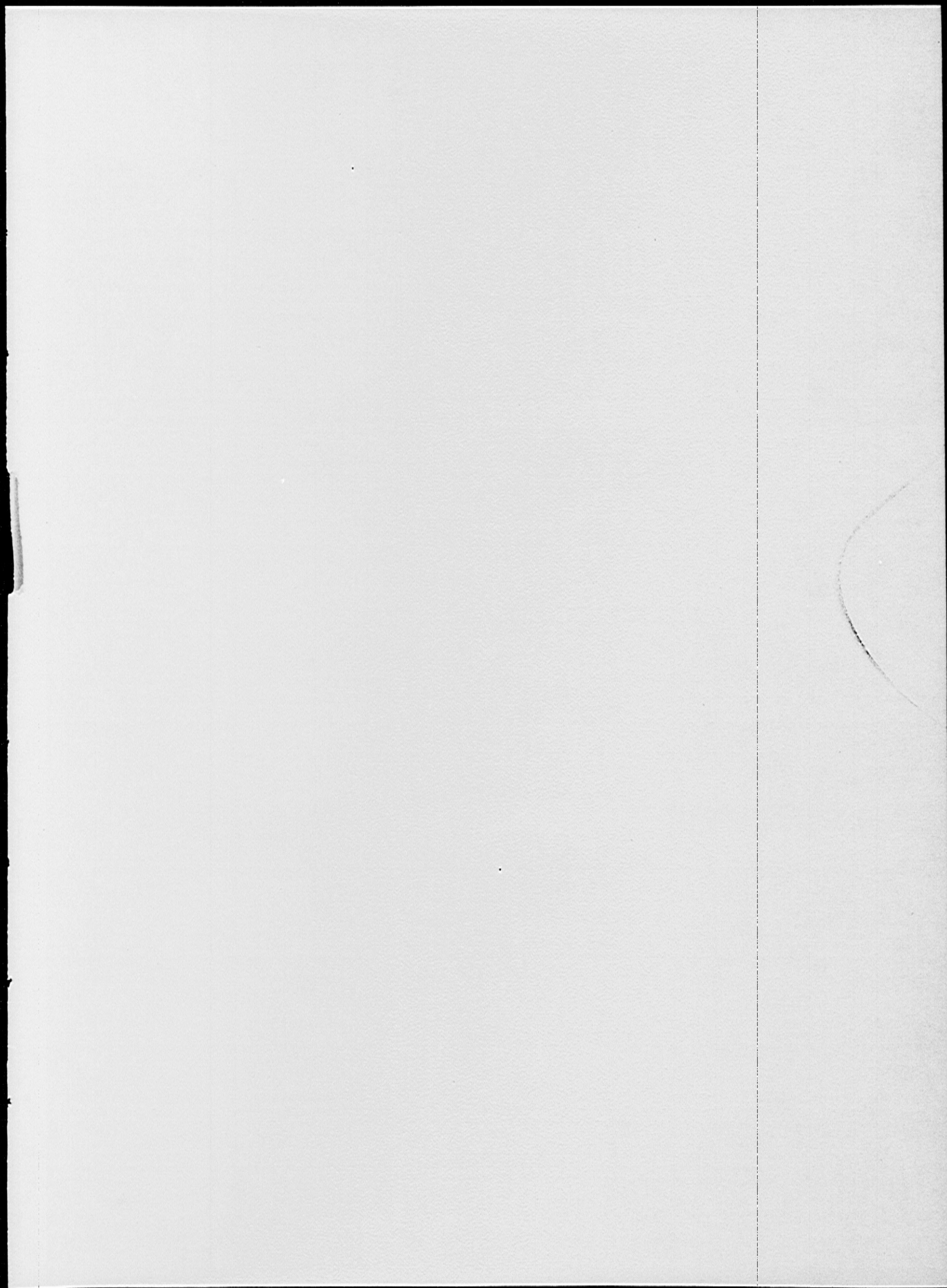
was material enough so that the jury might have reached a different conclusion without it. Moreover, the Government's failure to disclose Hairston's prior denial of his trial testimony creates a fundamental unfairness in the trial that cannot be cured by any further hearings. Only the new trial which he seeks can purge Palmer's case of this defect.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

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United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 10 1968

JOINT APPENDIX

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,741

366A

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal from Memorandum Opinion and Order
The Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,741

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

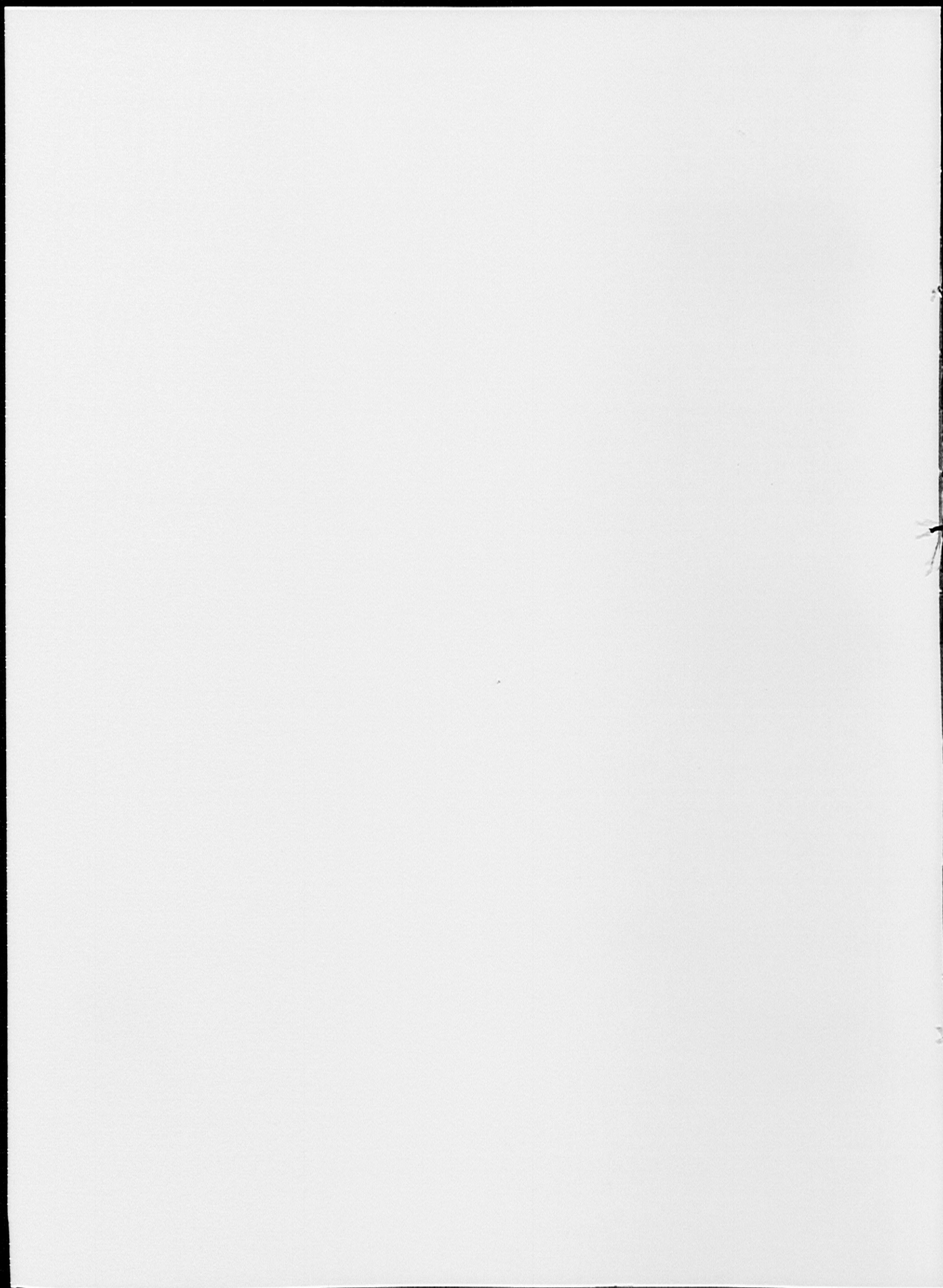
Appeal from Memorandum Opinion and Order
The Federal Communications Commission

JOINT APPENDIX

(i)

INDEX

	<u>Page</u>
<u>Case No. 21,741</u>	
PREHEARING STIPULATION, dated April 15, 1968	1
PREHEARING ORDER	2
Letter from Lauren A. Colby to Mr. Ben F. Waple, Secretary, F.C.C., dated August 17, 1967	3
EXCERPT OF ENGINEERING EXHIBIT CONTAINED IN APPLICATION	4
Figure B-2 — Area encompassed by the proposed 2 Mv/M contour	15
Figure B-3 — Hypothetical 10 Kw directional nighttime pattern to be potentially installed at Encino, Texas	17
PETITION FOR RECONSIDERATION, dated December 1, 1967	18
MEMORANDUM OPINION AND ORDER	20
Letter from the F.C.C. to Rio Grande Family Radio Fellowship, Inc., c/o John A. Pankratz, President, dated November 3, 1967	22
APPENDIX — Notice issued by the F.C.C. re standard broadcast applications available for processing pursuant to Section 1.571(c) of the Commis- sion's Rules, adopted July 5, 1967	24
Applications from the top of the processing line	25



JOINT APPENDIXIN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,	:	
	:	
	:	
	:	Appellant,
	:	
v.	:	Case No. 21,741
	:	
FEDERAL COMMUNICATIONS COMMISSION,	:	
	:	
	:	Appellee.

PREHEARING STIPULATION

The parties to the above appeal have entered into a stipulation stating that the following questions are those presented for the instant appeal:

1. Where Appellant tendered an application for a construction permit for a new standard broadcast station to operate on the frequency 850 kc at Pharr, Texas, and requested a waiver of the "clear channel freeze" (Section 1.569 of the Commission's Rules and Regulations), contending that its application could not prejudice the purpose of the freeze because a grant of said application would not bar the establishment of any new Class II-A stations on clear channels at a future date, whether the Commission erred in rejecting Appellant's factual showing without a hearing, and returning Appellant's application.

2. Where Appellant's above-described application was one of a number of mutually exclusive applications for the same frequency in different Texas cities, and where the Commission accepted the other applications for filing upon a determination that said applications did not violate the Rule in question, and will henceforth designate said applications for consolidated hearing proceedings, whether the Commission erred in dismissing Appellant's application and refusing to designate it for hearing with the other applications.

FILING OF JOINT APPENDIX

Counsel for the parties further stipulate that the joint appendix will be filed simultaneously with the filing of the reply brief, or if Appellant files no reply brief, then within 15 days of the filing of the brief of Appellee.

References to the record appearing in the various briefs of the parties shall be to the page numbers in the original record certified to this Court. In the printing of the joint appendix there will be set forth, in addition to the consecutive numbering of the pages of the joint appendix, the original record page numberd in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

Respectfully submitted,

/s/ Lauren A. Colby,
Counsel for Appellant

/s/ John J. Conlin,
Counsel for Appellee

April 15, 1968

[Filed April 24, 1968]

* * * * *

Before: Bazelon, Chief Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this Court, and that the stipulation and this order shall be printed in the joint appendix herein.

[1]

Law Offices
LAUREN A. COLBY
1334 G Street, N. W.
Washington, D. C. 20005

Lauren A. Colby
Gennaro D. Caliendo

District 7-0236

August 17, 1967

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

On behalf of my client, Rio Grande Family Radio Fellowship, Inc., I hand you herewith for filing, in triplicate, an application on FCC Form 301 for a construction permit for a new standard broadcast station to be located at Pharr, Texas.

In accordance with the Commission's requirement, the application is accompanied by two extra copies of Section V-G, and appropriate exhibits and notices of the application have been forwarded to the Federal Aviation Agency on FAA Form 117.

The application is accompanied by a check in the sum of \$75 in payment of the filing fee.

Should there be any questions concerning the enclosed application, please communicate with the undersigned.

Very truly yours,

/s/ Lauren A. Colby

LAC:sjw
Enclosure

EXCERPT OF ENGINEERING EXHIBIT CONTAINED IN APPLICATION
DISCUSSION

This firm has been retained to prepare an engineering report in support of an application for a new Standard Broadcast Station to be operated at Pharr, Texas. The proposed station will provide a first local AM service to Pharr, which had a 1960 population of 14,106.

PURPOSE FOR THE REPORT

This report sets forth in detail the coverage and allocation information required by the Commission's Rules and Parts V-A and V-G, FCC Form 301. Information has been developed in accordance with good engineering practice, using the applicable Rules and in harmony with the bilateral agreement with Mexico.

MUTUAL EXCLUSIVITIES

This proposal is mutually exclusive with the following proposals, due to prohibited overlap of contours as provided under §73.37 of the Rules:

NEW, Houston, Texas: Strauss Broadcasting Co. of Houston, no file number, tendered 5/31/67, requesting 850 kHz, 5 Kw, DA-D. NL 29-30-51; WL 95-17-58.

NEW, Houston, Texas: Artlite Broadcasting Company, BP-17577. Requests 850 kHz, 10 Kw, DA-D. NL 29-29-19; WL 95-40-19.

NEW, Humble, Texas: Albert L. Crain, BP-17550. Requests 850 kHz, 0.5 Kw, DA-D. NL 30-00-19; WL 95-13-17.

NEW, Nassau Bay, Texas: Jester Broadcasting Company. Requests 850 kHz, 1 Kw, DA-D, BP-17579. NL 29-28-34; WL 95-06-12.

Patterns for the above proposals are in the referenced applications on file with the Federal Communications Commission. Conductivities have been taken from Map M-3 of the Rules, and applied through use of the

"equivalent distance" method of computation where areas of differing conductivities were encountered.

FIELDS AND CONDUCTIVITIES

Fields for existing stations were taken from the FCC's Official List, for non-directional operations, and from patterns on file with the Commission for directional stations or proposals. Mexican stations were considered based upon the notifications to the FCC from Mexico as circulated by the Commission. Fields for the proposed station were computed on a properly programmed IBM Model 1620 solid state computer. MEO values of radiation were determined from a study of the computer data, and are both tabulated and shown in this report.

Conductivities were taken from Map M-3 of the Commission's Rules, excepting for Mexico where values were taken from the map contained in the NARBA agreement. Conductivities were applied through use of the "equivalent distance" method of computation where areas of differing conductivities were employed.

An exception to the above is the groundwave allocation toward KOA, a Class I-B Clear Channel station, operating on 850 kHz at Denver, Colorado. Conductivities of 30 mmhos, far exceeding the M-3 values, were assumed to and from KOA for purposes of showing that the proposed 0.005 Mv/M contour would not encroach upon the KOA 0.1 Mv/M ground-wave contour.

PROTECTION OF CLASS I-B STATIONS

As is shown in the several maps which form a portion of this report, the service area of KOA has been calculated on the basis of a conductivity higher than is involved in the path between sites. Similarly,

the conductivity from the proposed station has likewise been over-stated. The result is that there is still required separation, and there is no problem of incursion of groundwave signals.

For the Mexican Class I-B station, the values shown in the NARBA map have been used, and applied as described in this report. A careful study has been made, using MEO values of radiation, and crossing the Gulf of Mexico sea water areas having conductivity values of 5,000 mmhos, to assure that there will be no crossing of the proposed 0.005 Mv/M contour and the Mexican 0.1 Mv/M contour.

It is concluded on the basis of these detailed studies that there will be no interference to any Class I-B station as a result of this proposal.

IMPACT UPON FUTURE USE OF U. S. CLASS I-A's

A complete study has been made of the U. S. Class I-A Clear Channels +30 kHz from 850 kHz to determine whether or not the proposed station will have any impact upon future duplication by Class II-A Clear Channel stations which would serve a "white area" at night. These channels are mapped in this report, and are discussed individually.

820 kHz- — This channel is in use by WFAA-WBAP, Ft. Worth-Dallas, Texas. The proposed site is well within the 0.5 Mv/M 50% skywave contour plus 500 miles, and so there is no impact upon future use of the frequency.

830 kHz- — This channel is in use by WCCO, Minneapolis, Minnesota. The proposed site lies outside a 500-mile extension of the WCCO 0.5 Mv/M 50% skywave nighttime service contour. The area within which use of the channel would be precluded is that where the proposed 2 Mv/M contour would cross the 25 Mv/M contour of the Class II-A station.

A portion of the area is already blocked due to XERI, Ciudad Reynosa, Mexico, which operates non-directionally on 810 kHz with a power of 0.25 Kw. The area within the XERI 2 Mv/M contour is precluded from use by

the theoretical Class II-A station, and is shown in one of the studies in this report.

Additional studies appear elsewhere, detailing the problems with use of the 830 kHz assignment and involving a study of "white areas."

In light of the studies contained in this report, a "waiver" of the Rules is requested for the acceptance for filing of this proposal as having no impact upon the future use of 830 kHz by a potential Class II-A station serving a substantial white area.

840 kHz- — The entire 0.5 Mv/M service area falls within the 500-mile extension of the WHAS 0.5 Mv/M 50% skywave service contour. Therefore, there will be no impact upon future use of this channel.

870 kHz- — The entire 0.5 Mv/M service area falls within the 500-mile extension of the WWL 0.5 Mv/M 50% skywave service contour. Therefore, there will be no impact upon future use of this channel.

880 kHz- — This is the WCBS Clear Channel, which is to be duplicated by a Class II-A station in the states of North Dakota, South Dakota or Nebraska. KOA, Denver, Colorado, is much closer to these states than the proposed station, and the Commission

[50]

has determined that its 50 Kw operation will not result in intersection of the 25 Mv/M contours in contravention of the Rules. The proposed station obviously cannot place a 25 Mv/M signal into those states, and so no special additional studies are required.

SERVICE TO COMMUNITY

The proposed station will place a 25 Mv/M contour over virtually all the populated areas of Pharr, including the central business district. The 5 Mv/M contour encompasses all the city of Pharr, including the

"snorkel" extended to the Rio Grande River. Therefore, the coverage rules of the Commission are complied with completely.

STATIONS CONSIDERED

In addition to the applications mentioned, the following stations were considered in the development of this report:

WFAA, Dallas, Texas/WBAP, Ft. Worth, Texas: 820 kHz, 50 Kw, ND-247 Mv/M/Kw. NL 32-55-09; WL 97-01-34. Map M-3 conductivities. Class I-A.

WCCO, Minneapolis, Minnesota: 830 kHz, 50 Kw, ND-249 Mv/M/Kw. NL 45-10-40; WL 93-20-55. Map M-3 conductivities. Class I-A.

WHAS, Louisville, Kentucky: 840 kHz, 50 Kw, ND-256 Mv/M/Kw. NL 38-15-40; WL 85-25-40. Map M-3 conductivities. Class I-A.

KOA, Denver, Colorado: 850 kHz, 50 Kw, 225 Mv/M/Kw #ND. NL 39-30-22; WL 104-45-57. Conductivities assumed to be a uniform 30 mmhos for purposes of protection of the KOA 0.1 Mv/M ground-wave contour during daytime hours. Map M-3 used for other considerations. Class I-B.

KONO, San Antonio, Texas: 860 kHz, 1 Kw, 5 Kw L. S., DA-N. ND, D, 190 Mv/M/Kw. NL 29-26-14.3; WL 98-25-18.5. Map M-3 conductivities.

WWL, New Orleans, Louisiana: 870 kHz, 50 Kw, DA-1. Pattern on file with the Commission. NL 30-02-20.2; WL 90-14-36.5. Map M-3 conductivities.

WCBS, New York, N. Y.: 880 kHz, 50 Kw, ND-265. NL 40-51-35; WL 73-47-09. Map M-3 conductivities. Class I-A duplicated in North Dakota, South Dakota, or Nebraska.

HYPOTHETICAL Class II-A: 880 kHz, 50 Kw, ND, 1238 Mv/M, conductivity of 30 mmhos at nearest edge of Nebraska. No intersection of 25 Mv/M contours possible due to geographical separation.

NEW, Burkburnett, Texas: BP-17576. Req: 850 kHz, 1 Kw, DA-D. NL 34-03-47; WL 98-36-05. Map M-3 conductivities.

KFST, Ft. Stockton, Texas: 860 kHz, 0.25 Kw, D. ND-187 Mv/M/Kw. NL 30-52-35; WL 102-53-08. Map M-3 conductivities.

XEMY, Ciudad Mante, Ta.: 840 kHz, 0.5 Kw, ND-175 Mv/M/Kw. NARBA Map.

XEM, Chihuahua, Ch.: 850 kHz, 5 Kw, ND-175 Mv/M/Kw. NARBA Map.

XEZR, Zaragoza, Coahuila: 850 kHz, 1 Kw, ND-175 Mv/M/Kw. NARBA Map.

XETQ, Orizaba, Veracruz: 850 kHz, 100 Kw, ND-225 Mv/M/Kw. NARBA Map. I-B.

[51]

XENL, Monterrey, Nuevo Leon: 860 kHz, 5 Kw, ND-175 Mv/M/Kw. NARBA Map.

XETW, Tampico, Tam.: 860 kHz, 0.5 Kw, ND-175 Mv/M/Kw. NARBA Map.

XERI, Ciudad Reynosa: 810 kHz, 0.25 Kw, ND-175 Mv/M/Kw. NARBA Map.

The NARBA map closely parallels the last mapping contained in the Rules of the FCC dealing with areas outside the United States. Values from that map were transferred to larger scale mapping, as shown in this report, for convenience in preparation of the required contours.

DAYTIME SKYWAVE TOWARD CLASS I-B's

Highest pattern radiation is an MEO value of 202 Mv/M. If a separation of zero (0) miles is assumed on a bearing of 90° T. from the proposed site, the maximum permitted radiation during critical hours would be slightly in excess of 270 Mv/M. This value cannot be achieved at any elevation from the proposed pattern. Therefore, in view of the fact that separations are in excess of the minimum miles indicated, and the fact that the pattern cannot achieve the radiation which would create daytime skywave problems with no separation applying Figures 9 and 10 of the Commission's Rules, it may be properly concluded that there is no daytime skywave problem posed by this proposal.

[53]

FIGURE B

SPECIAL STUDY RELATIVE TO CLEAR CHANNELS IN THE UNITED STATES OF AMERICA

Figure B-1 illustrates the Clear Channel conditions alluded to elsewhere in this report. The only channel remaining for special consideration in this area is 830 kHz, and a "waiver" is requested to permit the acceptance for filing of this application on the basis that there will be no special impact upon that channel.

Figure B-2 illustrates the area encompassed by the proposed 2 Mv/M contour which must not cross the 25 Mv/M contour of any new Class II-A station on 830 kHz. [The inverse 2/25 Mv/M relationship also must be observed]. A substantial portion of this "precluded" area is included within the 2 Mv/M contour of XERI, a Mexican station operating on 810 kHz. The Mexican station, therefore, already limits the potential location of a Class II-A station.

Figure B-2 also illustrates the nighttime interference-free 2.5 Mv/M contour of KGBT, Harlingen, Texas, which operates as a Class II outlet on 1530 kHz. This contour reduces the unserved or "white area" to a relatively unpopulated area north of the "border cities" of Texas. Station KSOX in Raymondville, Texas, also operates at night and serves a small portion of the area.

Figure B-3 is a hypothetical 10 Kw directional nighttime pattern which would be potentially capable of being installed at, for example, Encino, Texas, and which would provide service within its 5.1 Mv/M interference-free contour to all but 44 square miles of the "white area," containing approximately 1,200 persons, based upon uniform distribution of population studies based upon the 1960 U. S. Census. It should be noted that the proposed pattern affords all the required 2/25 protections required, including that to the Mexican station.

It may be noted that the entire Encino division has less than 1,000 persons and its county, Brooks, has less than 9,000 population.

The U. S.-Mexican bilateral treaty provides for use at Mexico D. F. of 830 kHz by a Class II station, operating with 5 Kw power at night, directionalized to protect the U. S. border to 50 Uv/M. This station would limit forward lobe radiation from a U. S. Class II-A station to approximately 216 Mv/M, which would force the pattern to attain somewhat the proposed shape. Considering this requirement in the allocation, plus the XERI required protection, it is evident that the pattern shape, dividing the major lobe, is not as a result of proposed Pharr, Texas, but, rather, as a direct result of the existing allocation limitations. Indeed, with the sum total of protections involved — WCCO, XERI, and XELA — it may be questioned whether a Class II-A assignment would ever be made for this area of Texas on this particular frequency. Furthermore, this shape of pattern, at this location, goes into the Gulf of Mexico and land areas

of Mexico very quickly, thus being a very inefficient use of the channel from the standpoint of providing service to United States' "white area."

Nighttime stations within the proposed Pharr 2 Mv/M contour are as follows:

<u>CALL</u>	<u>CITY OF LICENSE</u>	<u>FREQUENCY</u>
KRIO	McAllen, Texas	910 kHz
KURV	Edinburg, Texas	710 kHz
KRGV	Weslaco, Texas	1,290 kHz
KGBT	Harlingen, Texas	1,530 kHz

<u>CALL</u>	<u>CITY OF LICENSE</u>	<u>FREQUENCY</u>
KSOX	Raymondville, Texas	1,240 kHz

There are no communities within the 44 square miles of "white area" shown in Figure B-2.

There are only two (2) communities having populations of 2,500 or greater which lie within the proposed 2 Mv/M contour but outside the XERI 2 Mv/M contour which do not have fulltime local broadcast stations. These are:

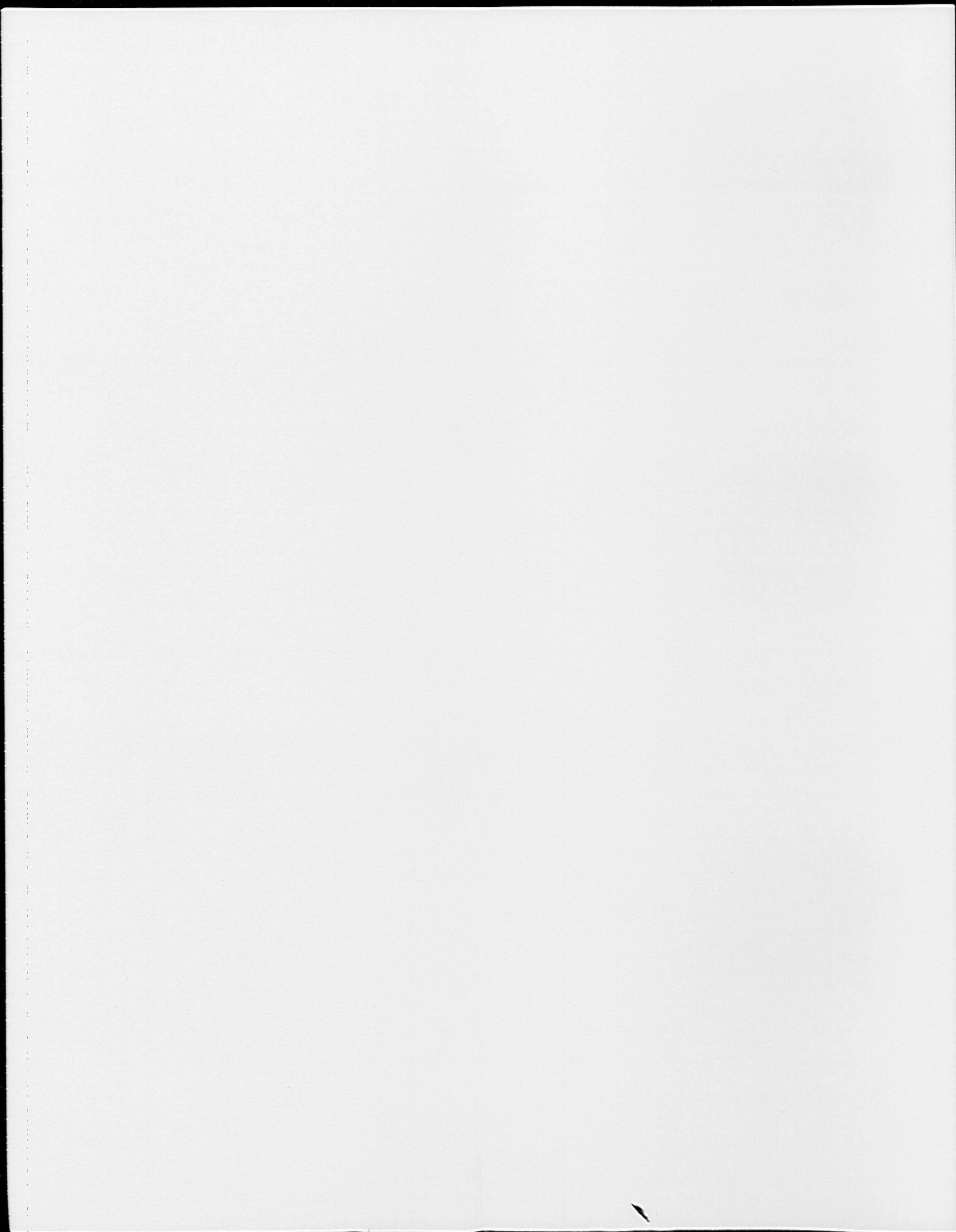
La Feria	—	Population 3,047
San Benito	—	Population 16,422

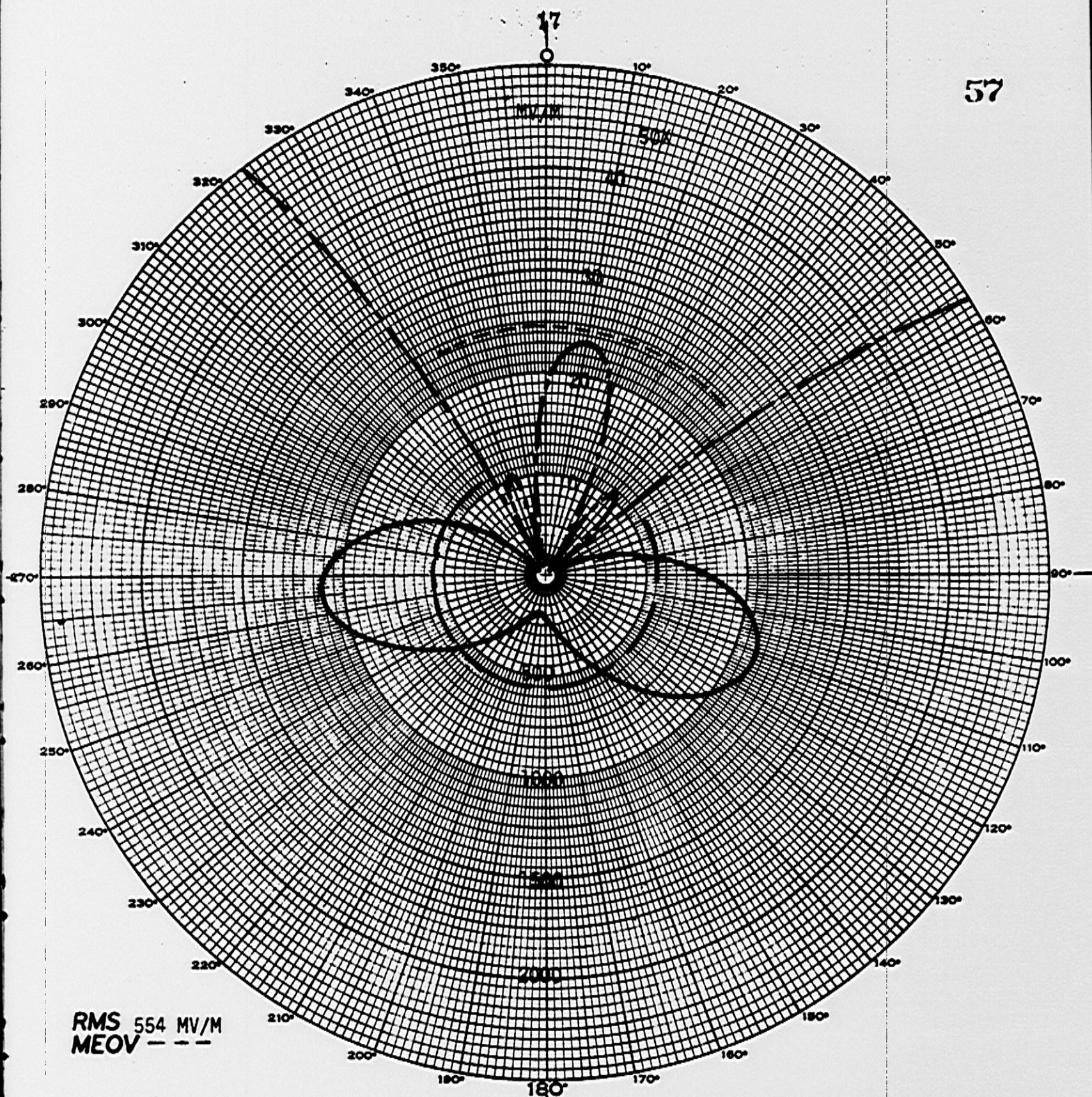
Both these cities are within less than 10 miles of Harlingen, and so receive service from KGBT at night.

As a practical matter, a new U. S. Class II-A operation could not be moved substantially closer to the international border at this point, due to the fact that the 1 Mv/M contour must not penetrate into Mexico at any point where it would overlap the 30 Mv/M contour of the XERI pattern. This factor is illustrated in Figure B-2, in line with Article II,

Par. D(4) of the bilateral agreement. This allocation condition further confirms that the proposed Pharr operation will have no material effect upon future use of 830 kHz, as the international agreement is controlling at this point.

From an engineering standpoint, therefore, there should be no impact upon Class II-A use of 830 kHz as a result of this proposal, and it is submitted that it may properly be granted a waiver of the Rules and accepted for filing.





TOWER PLACEMENT SKETCH	PATTERN PARAMETERS					FIGURE β -3	STATION DATA
G's=220° S=165° 10° T .51/ 35° S 1.0/ 0° S .51/-35°	TOWER No.	ELECTRICAL HEIGHT ft	SPACING ft	PHASING deg	FIELD RATIO r	HYPOTHETICAL CLASS II-A LOCATED AT ENCINO, TEXAS ***** NIGHT PATTERN	CALL FREQ 830 KHz POWER 10 KW TYPE DA-2 TIME NIGHT ✓ LAT. LONG.
1							E.H. MUNN, JR. RADIO ENGINEER COLDWATER, MICH.
2							
3							
4							
5							
6							
7							
8							
9							
10							
DAYTIME OPERATION ☐					NIGHTTIME OPERATION ☒	$\theta^\circ \equiv 0$	

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[77]

18

[77]

[Received December 1, 1967]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the matter of
Application of
RIO GRANDE FAMILY RADIO
FELLOWSHIP, INC.,
Pharr, Texas
For construction permit
To: The Full Commission

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File No. BP-_____

PETITION FOR RECONSIDERATION

Pursuant to Section 405 of the Communications Act, Rio Grande Family Radio Fellowship, Inc., by its attorney, hereby respectfully requests the Commission to reconsider and set aside its action of November 3, 1967, in support thereof, it is alleged:

1. On August 17, 1967, Rio Grande Family Radio Fellowship, Inc. submitted the above application for a construction permit for a new standard broadcast station at Pharr, Texas, a city of 14,106 persons. With respect to the frequency 850 kc, Section 1.569(b)(2)(iii) of the Commission's Rules requires applicants to show that "No interference or prohibited overlap would be caused to an assumed Class II-A station on an unduplicated channel, radiating at least 1,238 Mv/M omnidirectionally from the nearest point on the boundary described in subdivision (i) of this subparagraph." Applicant made a showing that its application satisfied the above requirement.

3. On November 3, 1967, however, the Commission returned

the application of Rio Grande Family Radio Fellowship, Inc., together with a letter, in which the Commission contends that the application violates the Rule and that a waiver of the Rule is not warranted because a grant of the application might preclude the future establishment of a Class II-A station somewhere in the State of Texas.

4. Petitioner respectfully submits that the Commission's actions were erroneous. First, the Commission's reference to the 30 to 1 protection ratio specified in the Mexican Agreement for protection to Mexican Station XERI, Ciudad Reynosa, Mexico, overlooks the much more critical requirement of Section 73.37 of the Commission's Rules, regarding permissible overlap between the Mexican station and any potential Class II-A facility in the United States. Section 73.37 of the Rules prohibits any overlap of the XERI 2 Mv/M contour with the 25 Mv/M contour of a United States Class II-A station. In fact, footnote 3 to Section 73.37 of the Rules specifically states that "where overlap would be received from a foreign station, the provisions of this Section will apply."¹

¹ Footnote 3 to Section 73.37 of the Rules provides that overlap may be caused to a foreign station in excess of the domestic protection requirements, provided that the requirements of the appropriate international treaty are still met. Thus, presumably a Class II-A U. S. station could put its 2 Mv/M contour across a Mexican station's 25 Mv/M contour on Mexican soil, or vice versa, without violating the Rules. However, what is involved here is received overlap from the Mexican station's 2 Mv/M contour on U. S. soil.

5. Moreover, it is respectfully submitted that the Commission's summary return of the Petitioner's application without hearing deprived Petitioner of due process of law. Here, Petitioner made a prima-facie showing in support of its request for waiver of Section 1.569 of the Commission's Rules. Such a showing having been made, the Commission

should, at a minimum, afford Petitioner a hearing on its waiver request.
United States v. Storer Broadcasting Co., 351 U. S. 192 (1956).

WHEREFORE, it is respectfully requested that the Commission reconsider and set aside its action of November 3, 1967, rejecting the above application.

Respectfully submitted,

/s/ RIO GRANDE FAMILY RADIO
 FELLOWSHIP, INC.

1334 G Street, N. W.
 Washington, D. C.

By _____
 Lauren A. Colby
 Its Attorney

December 1, 1967

Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D. C. 20554

In re Application of	:	
RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,	:	
Pharr, Texas	:	FCC 68-113
	:	11096
Requests: 850kc, 500w, DA, Day	:	
For Construction Permit	:	

MEMORANDUM OPINION AND ORDER

Adopted January 31, 1968; Released February 12, 1968

By the Commission: Commissioner Lee concurring and issuing a statement in which Commissioner Loevinger joins.

1. The Commission has before it for consideration the above-captioned application and a petition for reconsideration filed December 1, 1967, by Rio Grande Family Radio Fellowship, Inc., requesting reconsideration of the Commission's action, by letter dated November 3, 1967, denying the applicant's request for waiver of Section 1.569 of the Rules and returning the application.

2. In returning the application we noted that the proposed operation may prejudice the assignment of a new Class II-A facility on the 830kc channel. Although no engineering studies were submitted in support of the petition for reconsideration, it is stated therein that the Commission's action returning the application was erroneous. This contention is based on the allegation that the allocation of a Class II-A facility in the pertinent area involved is precluded due to the existing operation of XERI, Ciudad Reynosa, Mexico, on 810kc. Specifically, it is contended that the 25 Mv/M contour of any Class II-A assignment would receive overlap from the 2 Mv/M contour of XERI in violation of Section 73.37 of the Commission's Rules.

3. Contrary to the petitioner's allegations, the Commission finds that a Class II-A facility could be allocated in the area of concern without involving overlap of 2 and 25 Mv/M contours with XERI or any interference problem which would render the operation in violation of the U. S.-Mexican Agreement. Furthermore, as noted previously, our studies also indicate that the proposed Pharr operation would, in fact, prejudice the assignment of a Class II-A station. Thus, we can find no reason to reverse our prior determination that the application is unacceptable for filing.

Accordingly, the petition for reconsideration IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

*See attached concurring statement of Commissioner Lee in which Commissioner Loevinger joins.

[83]

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

6640

November 3, 1967

Address all Communications
to the Secretary

In Reply Refer to
8831

Rio Grande Family Radio Fellowship, Inc.
c/o John A. Pankratz, President
215 East Warren (P. O. Box 16)
Pharr, Texas 78577

Gentlemen:

Reference is made to your application, tendered August 17, 1967, for a construction permit for a new standard broadcast station in Pharr, Texas, to operate on 850 kilocycles and to the request for waiver of Section 1.569 of the Commission's rules.

The request for waiver of Section 1.569 of the rules is based on the contention that your proposed operation would not prejudice the assignment of a Class II-A proposal in the area involved since, as shown in your engineering studies, a Class II-A station could be allocated with a particular mode of operation which would not involve any conflict with your proposal.

The Commission has carefully considered the reasons advanced in support of your request for waiver and has concluded that they are not sufficient to establish that the proposed operation would not prejudice

[83]

23

the assignment of a new Class II-A proposal on the 830kc channel. It is indicated in your application that the directionalized daytime pattern for the assumed Class II-A is required to provide protection to XERI, Ciudad Reynosa, Mexico (810kc, 250w, Day). However, the Mexican Agreement specifies a 1 to 30 desired to undesired signal ratio within the service area of the station to be protected (i.e., the 15 Mv/M contour from the assumed Class II-A station should not overlap the 0.5 Mv/M contour XERI). From this it can be determined that a Class II-A facility could operate with 10kw non-directional during daytime hours at a location where white area exists, protect all existing stations, but involve 2 and 25 Mv/M overlap with your proposed operation. In addition, it should be noted that it is not possible to anticipate at this time the particular location or mode of operation which may be utilized by a II-A assignment on 830kc.

In view of the foregoing, your request for waiver of Section 1.569 is denied and your application is returned herewith. A copy of your application is being retained by the Commission for future reference.

[84]

Since a preliminary study of the application disclosed the deficiency noted above, no further studies were made to determine the acceptability of your proposal.

BY DIRECTION OF THE COMMISSION

Ben F. Waple
Secretary

cc: Mr. Lauren A. Colby
Mr. E. Harold Munn, Jr.

APPENDIX

The following Public Notice was omitted from the record. However, Appellant considers the Notice to be relevant and material and it is therefore being reproduced here.

FEDERAL COMMUNICATIONS COMMISSION



WASHINGTON, D. C. 20554

2767
PUBLIC NOTICE - B
July 10, 1967

STANDARD BROADCAST APPLICATIONS READY AND AVAILABLE
FOR PROCESSING PURSUANT TO SECTION 1.571(c)
OF THE COMMISSION'S RULES

Adopted July 5, 1967 ; Released

By the Chief, Broadcast Bureau:

Notice is hereby given, pursuant to Section 1.571(c) of the Commission's Rules, that on August 18, 1967 the standard broadcast applications listed in the attached Appendix will be considered as ready and available for processing. Pursuant to Section 1.227(b)(1) and Section 1.591(b) of the Commission's Rules, an application, in order to be considered with any application appearing on the attached list or with any other application on file by the close of business on August 17, 1967 which involves a conflict necessitating a hearing with an application on this list, must be substantially complete and tendered for filing at the offices of the Commission in Washington, D. C., by whichever date is earlier: (a) the close of business on August 17, 1967 or (b) the earlier effective cut-off date which a listed application or by any other conflicting application may have by virtue of conflicts necessitating a hearing with applications appearing on previous lists.

The attention of any party in interest desiring to file pleadings concerning any pending standard broadcast application pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, is directed to Section 1.580(i) of the Commission's Rules for provisions governing the time of filing and other requirements relating to such pleadings.

Attachment:

Applications from the top of the processing line:

EML-2173 WFAB, Miami, Florida
 United Broadcasting Company of Florida, Incorporated
 Has: 990kc, 5kw, DA-1, U (Miami-South Miami, Florida)
 Req: Modification of license to maintain one main studio

EML-2185 WCWR, Dunedin, Florida
 Pinellas Broadcasters
 Has: 1470kc, 5kw, D (Tarpon Springs, Florida)
 Req: Modification of license to change station location

BP-16967 KTHO, South Lake Tahoe, California
 Emerald Broadcasting Company
 Has: 590kc, 1kw, DA, D
 Req: 590kc, 1kw, D

BP-17444 NEW, River Falls, Wisconsin
 River Falls Radio Company
 Req: 1550kc, 1kw, D

BP-17483 NEW, Orleans, Massachusetts
 Seashore Broadcasting Company, Incorporated
 Req: 1170kc, 1kw, D

BP-17494 WBER, Travelers Rest, South Carolina
 Piedmont Broadcasting Company, Incorporated
 Has: 1580kc, 500w, D
 Req: 1580kc, 1kw, D

BP-17506 NEW, Wabash, Indiana
 Wabash Radio Company
 Req: 1510kc, 250w, DA, D

BP-17515 KUMU, Honolulu, Hawaii
 John Hutton Corporation
 Has: 1500kc, 1kw, U
 Req: 1500kc, 5kw, U

BP-17547 NEW, Ponce, Puerto Rico
 Radio Antilles, Incorporated
 Req: 1490kc, 250w, 1kw-LS, U

BP-17549 KACE, Riverside, California
 K-ACE Radio, Incorporated
 Has: 1570kc, 1kw, DA, D
 Req: 1570kc, 5kw, DA, D

(over)

BP-17550 NEW, Humble, Texas
Albert L. Crain
Req: 850kc, 500w, DA, D

BP-17551 NEW, Lebanon, Tennessee
Vernon Broadcasting Company
Req: 1170kc, 500w, D

BP-17552 NEW, Wickenburg, Arizona
Wickenburg Radio Company
Req: 1250kc, 500w, D

BP-17553 NEW, Charlevoix, Michigan
Charlevoix County Broadcasting Company
Req: 1270kc, 5kw, D

BP-17555 KTOH, Lihue, Kauai, Hawaii
Kauai Broadcasting Company
Has: 1490kc, 250w, 1kw-LS, U
Req: 1350kc, 5kw, U

BP-17559 NEW, Chariton, Iowa
Chariton Radio Company
Req: 1130kc, 500w, DA, D

BP-17560 NEW, Fayetteville, West Virginia
Claude R. Hill, Jr.
Req: 1450kc, 250w, 1kw-LS, U

BP-17561 NEW, Reidsville, Georgia
John M. Masters
Req: 1080kc, 1kw, D

BP-17563 NEW, Heath, Ohio
Central Ohio Broadcasting Company
Req: 1000kc, 250w, DA, D

BP-17564 NEW, Centreville, Virginia
Centreville Broadcasting Company
Req: 1000kc, 1kw, DA, D

BP-17570 NEW, Fort Lauderdale, Florida
Lauderdale Broadcast, Incorporated
Req: 1190kc, 5kw, DA, D



BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,741

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 20 1968

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(i)

QUESTIONS PRESENTED

1. Where Appellant tendered an application for a construction permit for a new standard broadcast station to operate on the frequency 850 kc at Pharr, Texas, and requested a waiver of the "clear channel freeze" (Section 1.569 of the Commission's Rules and Regulations), contending that its application could not prejudice the purpose of the freeze because a grant of said application would not bar the establishment of any new Class II-A stations on clear channels at a future date, whether the Commission erred in rejecting Appellant's factual showing without a hearing, and returning Appellant's application.

2. Where Appellant's above-described application was one of a number of mutually exclusive applications for the same frequency in different Texas cities, and where the Commission accepted the other applications for filing upon a determination that said applications did not violate the Rule in question, and will henceforth designate said applications for consolidated hearing proceedings, whether the Commission erred in dismissing Appellant's application and refusing to designate it for hearing with the other applications.

(ii)

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND REGULATIONS INVOLVED	9
STATEMENT OF POINTS	9
SUMMARY OF ARGUMENT	10
ARGUMENT	
I. The Commission's Action was Arbitrary, Capricious and Discriminatory	11
II. The Commission's Actions Were Contrary to the Provisions of Section 309 of the Communications Act	15
III. The Commission's Action Unlawfully Deprived Appellant of its Right to a Consolidated Hearing	16
IV. The Commission's Actions Were Contrary to the Provisions of Section 307(b) of the Communications Act	18
CONCLUSION	19
APPENDIX A - Statutes Involved	App. 1
APPENDIX B - Clear Channel Report, Paragraphs 20-21 . .	App. 8
APPENDIX C - Instances Where Commission Waived Section 1.569	App. 9

TABLE OF AUTHORITIES

CASES:Page

*Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945)	10,11,16,17
*Kessler v. FCC, 326 F.2d 673, 117 U.S. App. D.C. 130 (1963)	10,11,16,17
Ranger, et al v. FCC, 111 U.S. App. D.C. 44	6
*United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	15

DECISIONS OF THE COMMISSION:

Lauderdale Broadcast, Inc., 10 Pike & Fischer RR 2d 510 (1967)	5,12
Seashore Broadcasting Co., Inc. 8 Pike & Fischer RR 2d 175 (1966)	12
Valley Broadcasting Co., 11 Pike & Fischer RR 2d 920 (1967)	12

STATUTES:

Administrative Procedure Act of 1946, 5 U.S.C. 1001, et seq., Section 10	1
Communications Act of 1934, as amended, 47 U.S.C. 151, et seq.:	
Section 307(b)	11,18
Section 309(a)	11,15
Section 309(e)	11,16
Section 402(b)	1

RULES OF THE COMMISSION:

Page

Section 1.569	2,4,7,8,9,11
-------------------------	--------------

OTHER AUTHORITIES:

Order, in the Matter of Amendment of Section 1.569 of the Commission's Rules Applications for Frequencies Adjacent to Class I-A Channels, 3 Pike & Fischer RR 2d 1501-1502	4
Clear Channel Report, 21 Pike & Fischer RR 1804-1808	3
Supplement to the Clear Channel Report, 21 Pike & Fischer RR 1841-1842	4
Further Supplement to Report and Order, 21 Pike & Fischer RR 1843-1845	4

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,741

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is taken by Rio Grande Family Radio Fellowship, Inc. (hereinafter referred to as "Appellant"), pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended (47 U.S.C. 402(b)(6)), Section 10 of the Administrative Procedure Act (5 U.S.C. 1009), and Rule 37 of this Court, from a Memorandum Opinion and Order of the Federal Communications Commission (hereinafter referred to as "Commission"), released February 12, 1968, denying Appellant's Petition for Reconsideration of the Commission's action of November 3, 1967, dismissing and

physically returning Appellant's application for a construction permit for a new standard broadcast station at Pharr, Texas.

STATEMENT OF THE CASE

This is an appeal from an action of the Federal Communications Commission, returning an application for a construction permit as unacceptable, for an alleged violation of the "clear channel freeze" (Section 1.569 of the Commission's Rules and Regulations). To understand the case, it is first necessary to understand the background and history of the so-called "freeze".

There are in the standard broadcast band a total of 107 channels available for broadcasting. Originally, 24 of these channels were designated "clear channels" and of these channels, only one standard broadcast station was permitted to operate in the United States, at night. However, on February 20, 1945, the Commission commenced a rule making proceeding in Docket No. 6741, looking towards amendment of the rules to "break down" some or all of the clear channels, to permit more than one station to operate thereon. The Commission has said that the proceeding was instituted "on the basis of insistent claims that the clear channel concept of permitting only one station to operate at night on 24 of the 107 channels available for

standard broadcasting is wasteful of valuable spectrum space and otherwise not in the best interest of efficient utilization of the frequencies involved". See Clear Channel Report, 21 Pike and Fischer RR 1801, 1804 (1961).

To put the matter mildly, the resolution of the Clear Channel Proceeding was not a model of administrative efficiency and dispatch. Affairs dragged on for some 16 years, with numerous comments being filed on various interim reports and proposals by the Commission.^{1/} On November 1, 1961, the Commission adopted a Report, purporting to finally dispose of the proceeding. Actually, however, the Report was less than final. It determined that twelve of the clear channels should be "broken down", to allow one additional station, known as a Class II-A station, to operate on such channels at night. But as to the other twelve channels, the Commission postponed any decision as to their status until a future time, saying that it would consider later whether to "break down" these channels, or possibly authorize super-power (750 kilowatt) operation by the stations already assigned thereto.^{2/}

^{1/}For a history of the proceedings, see the Clear Channel Report, 21 Pike & Fischer RR 1804-1808.

^{2/}Clear Channel Report, Paragraphs 20-21. These paragraphs are reproduced in the Appendices to this brief.

In order to preserve its options with respect to the channels left in status quo (known as the "unduplicated channels"), the Commission imposed a "freeze" on the acceptance for filing of applications for adjacent channels (the Rules do not permit applications on the clear channels themselves), which might preclude the establishment of Class II-A stations on the unduplicated channels, or super-power operation on such channels. The freeze was initially announced in a Supplement to the Clear Channel Report, dated November 1, 1961 (21 Pike and Fischer RR 1841), and the terms of the freeze were modified and clarified by a "Further Supplement to Report and Order" released February 5, 1962 (21 Pike and Fischer RR 1843). Originally, the terms of the freeze specifically stated that it was to end not later than September 1, 1964.^{3/} However, as time went on and the status of the 12 unduplicated channels remained undecided, the Commission lifted the September 1, 1964, ceiling on the duration of the freeze --- taking such action on the last possible day for doing so, August 21, 1964 (see Report and Order in 3 Pike and Fischer RR 2d 1501).

So far as they are applicable to this case, the terms of the freeze, which are codified in Section 1.569 of the Commission's Rules, require an applicant who proposes to utilize a frequency

^{3/}21 Pike and Fischer RR 1844, third line from top of page.

adjacent to one of the unduplicated clear channels to demonstrate that his application will not preclude the possible establishment of a Class II-A station on the unduplicated clear channel, at some future date. This, he can do either by showing that his application meets certain engineering criteria set forth in the Rule, or he can request that the rule be waived on the basis of a showing that the area where he proposes to locate his station is not suitable for a Class II-A station. Many such waivers have been granted. See, e.g., Lauderdale Broadcast, Inc., 10 RR 2d 510 (1967). In fact, just in the past five years alone, there have been 54 such waivers. A list of waivers granted in the past five years is included in the Appendices to this brief.

Appellant, Rio Grande Family Radio Fellowship, Inc., is a non-stock, non-profit corporation, whose members are active in missionary and charitable work amongst poor persons of Mexican descent, living in the area along the Mexican border, near the city of Pharr, Texas. For some years, Appellant has been studying the possibility of establishing a missionary radio station in the border area to broadcast educational and evangelical programming and to better reach the people with whom Appellant's principals are working. Appellant engaged a consulting engineer to make a study of frequency availabilities,

and he reported that only one frequency, 850 khz,^{4/} offered any possibilities at all.

The respondent Commission has certain Rules, with which this Court is already familiar,^{5/} known as "cut off" Rules, and providing deadlines for the filing of applications for construction permits for new standard broadcast stations which are mutually exclusive with other such applications. On July 10, 1967, the Commission issued a public notice, announcing that certain applications for construction permits for new standard broadcast stations to operate on the frequency 850 khz in the State of Texas would be "cut off" on August 17, 1967, and that any competing applications for such facilities would have to be filed prior to that date.^{6/} On August 17, 1967, Appellant timely filed an

^{4/}The term "khz" may be new to the Court, so a few words of explanation are in order. Briefly, the term stands for "kilohertz", and means exactly the same thing as "kilocycles". Gustave Hertz, a German scientist, was the discoverer of electromagnetic radiation (radio waves), and his name has been used for many years in foreign countries as the unit of frequency. That is, one cycle per second is called one "Hertz"; 1000 cycles is one "kilohertz", etc. In the past year, there has been a movement to introduce the "Hertz" terminology into the United States; the movement has been virtually 100% successful; and the Commission has amended its Rules to make the use of the term official.

^{5/}See Ranger, et al v. FCC, 111 U.S. App. D.C. 44.

^{6/}The pertinent applications listed in the Commission's notice were those of Artlite Broadcasting Company for a construction permit for a new standard broadcast station at Houston, Texas; Steve Gose Enterprises, Incorporated, for a construction permit for a new standard broadcast station at Burkburnett, Texas; and Jester Broadcasting Company for a construction permit for a new standard broadcast station at Nassau Bay, Texas.

application for a construction permit for a new 500 watt standard broadcast station to operate on 850 khz at Pharr, Texas, a city of 15,279 persons, which presently has no local standard broadcast station. Appellant's station would create intolerable electrical interference with certain of the applications shown on the Commission's "cut off" notice and with certain other applications for new stations on 850 khz which were filed on or near the "cut off date", as follows:

<u>Place Applied for</u>	<u>Name of Applicant</u>	<u>File Number</u>
Houston, Texas	Strauss Broadcasting Co.	BP-17,780
Houston, Texas	Artlite Broadcasting Co.	BP-17,577
Humble, Texas	Albert L. Crain	BP-17,550
Nassau Bay, Texas	Jester Broadcasting Company	BP-17,579

Accordingly, Appellant's application was mutually exclusive with the above applications, and only one of the group of applications could be granted.

The frequency 830 khz is one of the unduplicated channels to which the clear channel freeze applies. The Commission has been studying the possibility of assigning an additional, high powered, Class II-A station on the frequency 830 khz. Thus, the freeze, codified in Section 1.569 of the Rules, requires applicants for frequencies near or adjacent to 830 khz to show that their proposed station will not preclude the assigning of a new, high powered Class II-A station on 830 khz. The various applicants

for 850 khz in Houston, Humble and Nassau Bay sought to show in their applications that their proposals would not preclude a possible new Class II-A assignment on 830 khz in the State of Texas. This, they attempted to do by showing that their applications complied with certain engineering criteria set forth in Section 1.569 of the Rules. The Commission accepted their showings, accepted their applications for filing, and said applications will shortly be designated for hearing to determine which should be granted.

Appellant also sought to show that its application would not preclude any possible new Class II-A assignment, and, to that end, Appellant made an extensive engineering presentation in its application and requested a waiver of Section 1.569 of the Rules. However, in contrast to the treatment afforded the Houston, Humble and Nassau Bay applications, the Commission rejected Appellant's showing, refused to accept Appellant's application for filing and instead, dismissed the application without a hearing. Appellant petitioned for reconsideration of the Commission's action, but on February 12, 1968, the Commission released a Memorandum Opinion and Order denying Appellant's Petition. Appellant hereby appeals from said Memorandum Opinion and Order.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Communications Act. of 1934, as amended, and the Commission's Rules and Regulations, are set forth in Appendix A, infra.

STATEMENT OF POINTS

1. Where Appellant filed an application for a construction permit for a new standard broadcast station to operate on the frequency 850 khz at Pharr, Texas, and requested a waiver of the "clear channel freeze" (Section 1.569 of the Commission's Rules and Regulations), and where Appellant made an extensive factual showing in support of such request for waiver, demonstrating that a grant of its application would not prejudice the purpose of the freeze because a grant of said application would not bar the establishment of any new Class II-A stations on clear channels at a future date, the Commission erred in rejecting Appellant's factual showing without a hearing, and returning Appellant's application.

2. Where Appellant's above-described application was one of a number of mutually exclusive applications for the same frequency in different Texas cities, and where the Commission accepted the other applications for filing upon a showing that said applications

would not prejudice the objectives of the so-called "freeze", the Commission's refusal to accept and consider Appellant's application unjustly deprived Appellant of its rights to a comparative hearing with the other applications. Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945); Kessler v. FCC, 326 F.2d 673, 117 U.S. App. D.C. 130 (1963).

SUMMARY OF ARGUMENT

Appellant's application for a construction permit for a new standard broadcast station in Pharr, Texas, was one of a number of mutually exclusive applications for the frequency 850 khz in the State of Texas. All of the various applicants were required to demonstrate that the establishment of a new station on 850 khz would not prejudice the possible future establishment of a new high powered Class II-A station on the frequency 830 khz, an unduplicated clear channel, the future utilization of which is undecided. It was arbitrary and capricious for the Commission --- without a hearing --- to pick and choose amongst the various applicants, accepting the showings submitted by the competing applicants, but rejecting the showing made by Appellant. Rather, the Commission should have afforded Appellant a hearing, so that Appellant could have a chance to demonstrate that its proposal would not, in fact, prejudice the future utilization of the 830 khz channel.

Furthermore, the hearing afforded to Appellant should have been a comparative hearing with the other competing applicants. By "freezing out" Appellant, the Commission insured that one of the competing applications for other communities would be granted, instead of Appellant's application for Pharr, Texas. Such action was contrary to both Section 309 of the Communications Act (which Congress enacted to insure Appellant a comparative hearing on its proposal) and to Section 307(b) of the Act, requiring the Commission to promote a "fair, efficient and equitable distribution of radio frequencies". Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945); Kessler v. FCC, 326 F.2d 673, 117 U.S. App. D.C. 130 (1963).

ARGUMENT

I

The Commission's Action was Arbitrary, Capricious and Discriminatory

Section 1.569 of the Commission's Rules, codifying the temporary freeze on frequencies adjacent to the unduplicated clear channels, is not a rigid, unflexible rule. On the contrary, as shown in the Statement of the Case, it is a standard which has been waived many, many times. In fact, in the past five years alone, there have been 54 such waivers, enumerated in the

Appendices to this brief. In all such waiver cases, the applicant is required to demonstrate only that a grant of his proposal would not prejudice the possible establishment of a new Class II-A station on the clear channel to which his proposal is adjacent. If he can show that, he can and (in the interest of consistency) must be granted a waiver. Lauderdale Broadcast, Inc., 10 Pike and Fischer RR 2d 510 (1967). Cf., also, Seashore Broadcasting Co., Inc., 8 RR 2d 175 (1966); Valley Broadcasting Co., 11 RR 2d 920 (1967).

Appellant submitted an extensive engineering presentation to show that because of various engineering restrictions imposed by the necessity of avoiding interference to other stations, no practical Class II-A station could be allocated to the Pharr, Texas, area. Such Class II-A stations are required to serve at least 25% "white area" (area not served by any existing station), and applicant's engineering showing demonstrated that no station could be designed which would serve significant amounts of "white area" without encountering problems of interference to other stations. Applicant's consulting engineer said, in part,

"Figure B-1 illustrates the Clear Channel conditions alluded to elsewhere in this report. The only channel remaining for special consideration in this area is 830 kHz, and a "waiver" is requested to permit the acceptance for filing of this application on the basis that there will be no special impact upon that channel.

"Figure B-2 illustrates the area encompassed by the proposed 2 Mv/M contour which must not cross the 25 Mv/M contour of any new Class II-A station on 830 kHz. [The inverse 2/25 Mv/M relationship also must be observed]. A substantial portion of this "precluded" area is included within the 2 Mv/M contour of XERI, a Mexican station operating on 810 kHz. The Mexican station therefore already limits the potential location of a Class II-A station.

"Figure B-2 also illustrates the nighttime interference-free 2.5 Mv/M contour of KGBT, Harlingen, Texas, which operates as a Class II outlet on 1530 kHz. This contour reduces the unserved or "white area" to a relatively unpopulated area north of the "border cities" of Texas. Station KSOX in Raymondville, Texas, also operates at night and serves a small portion of the area.

"Figure B-3 is a hypothetical 10 Kw directional nighttime pattern which would be potentially capable of being installed at, for example, Encino, Texas, and which would provide service within its 5.1 Mv/M interference-free contour to all but 44 square miles of the "white area", containing approximately 1200 persons, based upon uniform distribution of population studies based upon the 1960 U. S. Census. It should be noted that the proposed pattern affords all the required 2/25 protections required, including that to the Mexican station.

"It may be noted that the entire Encino division has less than 1,000 persons and its county, Brooks, has less than 9,000 population.

"The U. S. - Mexican bi-lateral treaty provides for use at Mexico D. F. of 830 kHz by a Class II station, operating with 5 Kw power at night, directionalized to protect the U. S. border to 50 uv/m. This station would limit forward lobe radiation from a U. S. Class II-A station to approximately 216 Mv/M, which would force the pattern to attain somewhat the proposed shape. Considering this requirement in the allocation, plus the XERI required protection, it is evident that the pattern shape, dividing the major lobe, is not as a result of proposed Pharr, Texas,

but, rather, as a direct result of the existing allocation limitations. Indeed, with the sum total of protections involved - WCCO, XERI, and XELA - it may be questioned whether a Class II-A assignment would ever be made for this area of Texas on this particular frequency. Furthermore, this shape of pattern, at this location, goes into the Gulf of Mexico and land areas of Mexico very quickly, thus being a very inefficient use of the channel from the standpoint of providing service to United States' "white area"." (Emphasis supplied)

Thus, applicant's consultant pointed out that even if some sort of Class II-A station could be allocated to the area (which he does not concede), it would necessarily be an inefficient facility, which would not make a practical use of the frequency.

The Commission, however, refused to accept Appellant's application, because it disagreed with Appellant's engineer. An issue of fact exists as to who is correct --- Appellant's engineer or the Commission's engineers. An issue of fact also exists as to whether, even if the Commission's engineers are correct that some sort of inefficient Class II-A facility could be allocated, such a facility would be a practicable one. The Commission's disposition of such factual issue without a hearing places Appellant at an extreme disadvantage, because Appellant has been granted no opportunity to explore the question of where the Commission might, in fact, locate any possible future Class II-A facility. At a hearing proceeding, this question could and should be explored, so that Appellant may show (if it can) that its proposal would not be inconsistent with the establishment of such a facility.

Appellant is entitled to such a hearing. Having made a strong threshold showing in support of a rule which has been routinely waived in the past, Appellant deserves such a hearing as a matter of law, and the Commission's summary rejection of Appellant's application was arbitrary and capricious. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

II

The Commission's Actions Were Contrary to the Provisions of Section 309 of the Communications Act

The Commission's rejection of Appellant's application without a hearing was, moreover, contrary to the express provisions of Section 309 of the Communications Act. Here, a material issue of fact exists. Broadly put, the issue is simply whether Appellant's proposal would prejudice the future utilization of the clear channel frequency 830 khz. Appellant says --- and desires an opportunity to prove --- that it won't. The Commission says it will.

Where such an issue exists, Section 309 of the Communications Act directs that it be resolved through the hearing process. Thus, Section 309(a) of the Act provides that if an application is filed, and the Commission is able, upon examination thereof, to find that a grant thereof will serve the public interest, convenience and necessity, the Commission shall grant the application without hearing. But if, because of the existence of a material issue of

fact, the Commission cannot make such a finding, the action which it should take is specified in Section 309(e), which directs that the application be designated for hearing. The Commission's action here --- simply returning the application and resolving the issue of fact against the Appellant --- is simply nowhere sanctioned by the provisions of Section 309 of the Act or any other provisions of the Act.

III

The Commission's Action Unlawfully Deprived Appellant of its Right to a Consolidated Hearing

Adding still more urgency to the need for a full and fair hearing on Appellant's application is the fact that said application is mutually exclusive with other applications which, if they are granted, will preclude a grant of Appellant's application. It is hornbook law that where, as here, a group of mutually exclusive applications are involved, the Commission may not pick a "winner" without the benefit of hearing proceedings. Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945). Furthermore, the pendency or imposition of a temporary freeze on applications does not deprive applicants of their "Ashbacker Rights". Kessler v. FCC, 326 F.2d 673, 117 U.S. App. D.C. 130 (1963).

The Kessler case is directly in point. There, certain applications were on file for new standard broadcast stations. On May 10, 1962, without notice or warning, the Commission imposed a temporary freeze on the acceptance and processing of virtually all new standard broadcast stations. The "freeze" caught prospective competing applicants by surprise. Several, however, completed their applications anyway, and tendered them for filing. The Commission rejected them, and the affected applicants appealed to this Court, which held, squarely, that the Commission could not grant without hearing applications filed prior to May 10, 1962, which were mutually exclusive with the applications caught in the freeze. This Court said,

"We have concluded that those appellants who tendered applications which are, or become, in fact mutually exclusive with an application pending on May 11, 1962, or one accepted for filing since that date, are entitled to participate in a comparative hearing on that application under the Ashbacker case - if any grant is to be made - and that the Commission may not deprive them of this right when their applications were timely but were rejected only because of a temporary freeze on accepting new applications. The substantial effect of a contrary view would be not only to freeze the acceptance for filing of a timely application but to freeze new applicants permanently out of a right of substance - the comparative hearing on the pending application to which they are entitled when their application is timely."

Here, as in Kessler, Appellant may not be deprived of its Ashbacker rights solely by reason of the pendency of a temporary freeze. But here, unlike the situation in Kessler, the "freeze" is not an all-inclusive, absolute affair, and a material issue

of fact exists as to whether it should even be applied to Appellant's application. Consequently, the proper remedy is to order Appellant's application consolidated for hearing, now, with the other applications which conflict with it, so that Appellant may demonstrate that its proposal will not, in fact, prejudice the objectives of the freeze rule.

IV

The Commission's Actions Were
Contrary to the Provisions of
Section 307(b) of the Communications Act

Finally, the Commission's rejection of the Appellant's application without a hearing was contrary to the mandate of Section 307(b) of the Communications Act to promote a "fair, efficient and equitable distribution of radio frequencies". Appellant proposes to establish a first local radio station in Pharr, Texas, a city of 15,279 persons which presently has no such station. At least two of the competing applications propose stations at Houston, Texas, which already has a multiplicity of standard broadcast services. By refusing to even consider Appellant's application, solely because of the pendency of a temporary freeze on the frequency involved, the Commission has made a major "307(b)" decision, to allocate the frequency to Houston (or Humble or Nassau Bay), and not to Pharr. The making of such a decision, without a hearing, is clearly contrary to

the Commission's statutory duty to weigh the applications on their merits, and so allocate radio frequencies as to promote a fair, efficient and equitable distribution thereof.

CONCLUSION

It is respectfully submitted that the Commission's actions herein were arbitrary, capricious and otherwise erroneous. For all of the foregoing reasons, the Commission's Memorandum Opinion and Order appealed from herein should be reversed, and the case remanded to the Commission with instructions to accept Appellant's application for filing nunc pro tunc, as of the date when it was originally tendered for filing. Further, Appellant requests such other, further or different relief as to this Court shall seem just and proper.

Respectfully submitted,

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FELLOWSHIP, INC.

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APPENDIX A

STATUTES INVOLVED

The relevant parts of the Statutes to which references are made in Appellant's brief follow:

Administrative Procedure Act of 1946, 5 U.S.C. § 1001, et seq., Section 10.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion -

(a) Right of Review. - Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof...

Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq., Section 309.

* * *

Section 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the

matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Proceedings To Enjoin, Set Aside, Annul, or
Suspend Orders of the Commission

* * *

Section 402.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

* * *

Section 307.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

RULES AND REGULATIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

§1.569 Applications for frequencies adjacent to Class I-A channels. - Notwithstanding the provisions of any other rules of the Commission, all applications (regardless of when they were or may be filed) for frequencies located within 30 kc/s of a Class I-A channel listed in §73.25(a) of this chapter will be subject to the provisions of this section. The provisions of paragraph (a) of this section apply to the frequencies listed therein, which are within 30 kc/s of a Class I-A channel on which an unlimited time Class II assignment is specifically provided for in §§73.22 or 73.25(a) of this chapter, and which are not within 30 kc/s of the remaining Class I-A channels (except that the frequency 1230 kc/s is considered to be within 30 kc/s of duplicated I-A channels only). The provisions of paragraph (b) of this section apply to the frequencies listed

in that paragraph, which are within 30 kc/s of unduplicated Class I-A channels and also, in each case, within 30 kc/s of Class I-A channels on which an unlimited time Class II assignment is specifically provided for in §73.22 or §73.25(a) of this chapter. For the purposes of paragraph (b)(2)(i), (ii) and (iii) of this section, the frequency 750 kc/s is regarded as an unduplicated Class I-A clear channel. The provisions of paragraph (c) of this section apply to the three frequencies listed therein, which are within 30 kc/s of unduplicated clear channels only.

(a) (1) The provisions of this paragraph apply to the following frequencies: 910, 920, 990, 1000, 1080, 1090, 1110, 1230 and 1240 kc/s; and 740 kc/s except with respect to the Class I-A clear channel 750 kc/s, in which case the provisions of paragraph (b) of this section apply.

(2) Where it appears that the facilities requested in any application for one of the designated frequencies (other than an application by an existing Class IV station to increase daytime power on 1230 or 1240 kc/s) involves undue risk of interference or prohibited overlap with a possible new Class II-A assignment specified in §73.22 of this chapter or a new unlimited time Class II assignment at Anchorage, Alaska, or San Diego, California, specified in §73.25(a) of this chapter, such application will not be accepted for filing or, if filed prior to the effective date of this section, will not be acted upon, until the location and operating facilities of such new Class II station are established. An application for one of the designated frequencies shall be deemed to involve undue risk of interference with a possible new Class II assignment unless it is demonstrated that no interference would be caused to specified II-A assignments within 30 kc/s, assuming facilities to be located at the nearest point on the boundary of the nearest state specified by the Clear Channel Decision released September 14, 1961, and assuming such II-A facility radiates at least 1238 mv/m omnidirectionally; and, in the case of frequencies within 30 kc/s of 750 kc/s or 760 kc/s the proposed facility would not cause interference to Class II assignments at San Diego, California, or Anchorage, Alaska, specified in §73.25(a) of this chapter.

(3) Assignments of new Class II facilities provided for in §§73.22 and 73.25(a) of this chapter will be made without regard to the pendency of applications on adjacent frequencies (i.e., the ten frequencies designated in subparagraph (1) of this paragraph and the additional 20 frequencies which are within 30 kc/s of both duplicated and unduplicated Class I-A channels). Any hearing which may be held on an application for an adjacent frequency will not be comparative with respect to the Class II-A facility, and any issues pertaining to the

mutual impact of the Class II-A and adjacent channel proposals will be confined to the question of whether, with the Class II station operating as proposed, the public interest would be served by a grant of the adjacent channel application.

(b) (1) The provisions of this paragraph apply to the following frequencies: 680, 690, 710, 730, 790, 800, 810, 850, 860, 900, 1010, 1050, 1060, 1070, 1130, 1140, 1150, 1170, 1190, and 1220 kc/s; and 740 kc/s with respect to the Class I-A clear channel 750 kc/s.

(2) Applications for new stations on, change of existing stations to, or for any major change in operation of stations presently operating on the designated frequencies will be accepted for filing and acted upon in normal course provided they are accompanied by appropriate exhibits and necessary supporting data to show clearly the following with respect to all Class I-A channels within 30 kc/s of the designated frequency:

(i) The proposed transmitter site is located inside the area encompassed by a 500-mile extension of the 0.5 mv/m-50 per cent nighttime contour of Class I-A stations on unduplicated channels.

(ii) No interference or prohibited overlap would be caused to Class I-A stations on unduplicated I-A channels, assuming such stations operate with power increased to 750 kw with their present antenna systems and radiation patterns.

(iii) No interference or prohibited overlap would be caused to an assumed Class II-A station on an unduplicated channel, radiating at least 1238 mv/m omnidirectionally from the nearest point on the boundary described in subdivision (i) of this subparagraph.

(iv) No interference or prohibited overlap would be caused to presently specified Class II-A assignments, assuming such facilities to be located at the nearest point on the boundary of the nearest state specified by the Clear Channel Decision released September 14, 1961, and assuming such II-A facility radiates at least 1238 mv/m omnidirectionally; and, in the case of frequencies within 30 kc/s of 750 kc/s or 760 kc/s, the proposed facility would not cause interference

to Class II assignments at San Diego, California, or Anchorage, Alaska, specified in §73.25(a) of this chapter.

(3) Applications of the type specified in subparagraph (2) of this paragraph filed before October 30, 1961, will be studied to determine whether they comply with each of the four standards set forth in subparagraph (2) of this paragraph. Those applications which are found to comply fully with the standards will be processed and acted upon in normal course. Applications which fail to comply with one or more of the standards will be retained in the pending file without further processing or consideration.

(4) Applications for other changes in facilities on the designated frequencies will be processed and acted upon in normal course.

(c) (1) The provisions of this paragraph apply to all applications for the following frequencies: 610, 620, 630 kc/s.

(2) Applications for new stations on, change of existing stations to, or for any major change in operation of stations presently operating on the designated frequencies will be accepted for filing and acted upon in normal course provided they are accompanied by appropriate exhibits and necessary supporting data to show clearly the following with respect to all Class I-A channels within 30 kc/s of the designated frequency:

(i) The proposed transmitter site is located inside the area encompassed by a 500-mile extension of the 0.5 mv/m-50 per cent nighttime contour of Class I-A stations on unduplicated channels.

(ii) No interference or prohibited overlap would be caused to Class I-A stations on unduplicated I-A channels, assuming such stations operate with power increased to 750 kw, with their present antenna systems and radiation patterns.

(iii) No interference or prohibited overlap would be caused to an assumed Class II-A station on an unduplicated channel, radiating at least 1238 mv/m omnidirectionally from the nearest point on the boundary described in subdivision (i) of this subparagraph.

(3) Applications of the type specified in subparagraph (2) of this paragraph filed before October 30, 1961, will be studied to determine whether they comply with each of the three standards set forth in subparagraph (2) of this paragraph. Those applications which are found to comply fully with the standards will be processed and acted upon in normal course. Applications which fail to comply with one or more of the standards will be retained in the pending file without further processing or consideration.

(4) Applications for other changes in facilities on the designated frequencies will be processed and acted upon in normal course.

(d) (1) Applications previously accepted for filing which must be held without action pursuant to paragraph (a), (b), or (c) of this section, will not be designated for hearing unless they conflict with applications which may be acted upon in normal course.

(2) If the decision in a hearing looks toward grant of an application which may not be acted upon, pursuant to paragraph (a), (b), or (c) of this section.

APPENDIX B

CLEAR CHANNEL REPORT,
PARAGRAPHS 20-21

20. Some parties have throughout the long history of this proceeding forcefully urged strenuous objection against the use of higher power which, it is asserted, would give vastly undue competitive pre-eminence to the very few stations to whom in any case powers on the order of 500 kw to 750 kw could conceivably be authorized. The Commission, while aware of the strength of these contentions, cannot on the other hand ignore the potential for significant additions to service which the employment of higher power on even a few stations could make possible. Our close scrutiny of the portions of the record going to the issue of higher power fails to persuade us that, whatever the merits of the pending proposals for higher power, the objections listed against it have been sufficiently met. Upon careful consideration of the question, we conclude that there is insufficient basis before us for a finding that the public interest would be served by authorizing higher power, but that at the same time the question warrants further consideration in the light of such improvements and changes in service as may result from the action we now take to authorize additional unlimited time stations on 13 of the Class I-A clear channels.

21. We thus leave open and unprejudiced the question of whether and if so how, the public interest would be served by changing the rules affecting the use of the 12 Class I-A channels now left in statu quo. At such time as further developments, including progress under the changes we now adopt, provide needed additional light on the question we will give further consideration to how best to utilize the 12 clear channels not now disturbed. It is manifestly desirable to do so on the basis of then current data and not to hold the instant proceeding open for the purpose. Much of the record herein was compiled years ago under different circumstances which have since changed markedly, and which may be expected to undergo further change. However, in any subsequent proceedings which may be held on the disposition of the twelve channels now left in statu quo, parties will be permitted to incorporate by reference specifically designated pleadings herein, or designate portions thereof, as may be relevant to matters then under consideration.

App. 9
INSTANCES WHERE COMMISSION
WAIVED SECTION 1.569

APPENDIX C

March 15, 1968
Rock City Broadcasting, Inc.
Chattanooga, Tennessee
1190 kc, 10 kw

March 6, 1968
Greencastle Broadcasting Company
Greencastle, Pennsylvania
1130 kc, 1 kw

December 20, 1967
Radio KLOK, Inc.
San Jose, California
1170 kc, 10 kw

December 13, 1967
Southern Broadcasting, Inc.
Gallatin, Tennessee
1130 kc, 5 kw

November 30, 1967
Fetzer Broadcasting Company
Cadillac, Michigan
1370 Khz, 1 kw night, 5 kw-LS

November 30, 1967
Tri-County Radio Company, Inc.
Winona, Mississippi
1190 kc, 500 watts

November 8, 1967
Jay Sadow, licensee of WRIP
Chattanooga, Tennessee
980 kc, 500 w, D

October 11, 1967
Gordon Broadcasting of San Diego, Inc.
San Diego, California
1130 kc, 1 kw night, 5 kw-LS (DA-2)

February 15, 1967
Trans-Florida Radio, Inc.
Bartow, Florida
1130 kc, 1 kw

February 15, 1967
Tacoma Broadcasters, Inc. (KTAC)
Tacoma, Washington
850 kc, 1 kw, DA-N

January 6, 1967
Harpeth Valley Broadcasting Co.
Franklin, Tennessee
1140 kc, 250 w

January 6, 1967
Mechanicville Broadcasting Co.
Mechanicville, New York
1170 kc, 1 kw, DA

January 6, 1967
Radio New Jersey
Lakewood, New Jersey
1170 kc, 5 kw, DA

January 6, 1967
Somerset Broadcasting Co.
Somerville, New Jersey
1170 kc, 1 kw

January 6, 1967
Radio Cranston, Inc.
Cranston, Rhode Island
1170 kc, 5 kw, DA

January 6, 1967
Seashore Broadcasting Co., Inc.
Orleans, Massachusetts
1170 kc, 1 kw, DA

January 6, 1967
Radio Cornwall
Cornwall, New York
1170 kc, 5 kw, DA

December 15, 1966
Ray A. Childers
Spray, North Carolina
1130 kc, 1 kw

December 15, 1966

T.J. Shriner
Bellaire, Texas
1170 kc, 250 w

November 9, 1966

Harry D. Stephenson and
Robert E. Stephenson
Lexington, North Carolina
1140 kc, 1 kw, DA

November 2, 1966

Smiles of Graham, Inc.
Graham, North Carolina
1190 kc, 250 w, DA

November 2, 1966

John B. Weeks
Warsaw, New York
1140 kc, 1 kw, DA

November 2, 1966

Monroe Broadcasting Co.
Monroe, North Carolina
1190 kc, 500 w

November 2, 1966

Oxbow Broadcasting Corp.
Genesco, New York
1140 kc, 500 w

October 20, 1966

Columbia Broadcasting System, Inc.
Los Angeles, California
1070 kc, 5 kw, U

October 12, 1966

Jackson Miss. Broadcasting Co.
Jackson, Missouri
1170 kc, 250 w, DA

September 28, 1966

WKKO Radio, Inc.
Cocoa, Florida
860 kc, 1 kw

September 22, 1966

Western Broadcasting Co.
Vancouver, Washington
1150 kc, 1 kw

September 22, 1966

Latin Broadcasting Corporation
Miami, Florida
1220 kc, 250 w, D

September 22, 1966

Arthur S. Steloff
Toms River, New Jersey
1170 kc, 1 kw

September 15, 1966

David B. Jordan
Selmer, Tennessee
1130 kc, 250 w

September 15, 1966

Bay Broadcasting Corp.
Bay St. Louis, Missouri
1190 kc, 5 kw

August 11, 1966

Faulkner Radio, Inc.
Slidell, Louisiana
1190 kc, 5 kw

August 11, 1966

Mid-State Broadcasting Co.
Lakewood, New Jersey
1170 kc, 5 kw, DA

August 11, 1966

"What the Bible Says, Inc."
Henrietta, New York
1140 kc, 500 w

July 13, 1966

George G. Beasley
Benson, North Carolina
1580 kc, 500 w, D

February 16, 1966
Noble-DeKalb Broadcasting Co., Inc.
Kendallville, Indiana
1570 kc, 250 w

December 22, 1965
Shawnee Broadcasting Co.
Aliquippa, Pennsylvania
1130 kc, 250 w

December 16, 1965
Great Southern Broadcasting Co.
Donelson, Tennessee
1190 kc, 250 w

November 24, 1965
Glenkaren Associates, Inc.
Atlanta, Georgia
1600 kc, 1 kw, D

September 29, 1965
Kentuckiana Broadcasting Inc.
New Albany, Indiana
1130 kc, 1 kw

September 29, 1965
Shively Broadcasting Co.
Shively, Kentucky
1130 kc, 500 w

September 29, 1965
Albert S. Tedesco (WWCM)
Brazil, Indiana
1380 kc, 500 w, DA-D

September 8, 1965
E.F. Jones, Jr.
Gallatin, Tennessee
1130 kc, 250 w

September 8, 1965
Blue Ridge Broadcasting Co., Inc.
Seneca, South Carolina
1150 kc, 1 kw, D

June 30, 1965
Brownsville Radio Inc.
Brownsville, Pennsylvania
1130 kc, 1 kw

April 29, 1965
Lawrence County Broadcasting Corp.
New Castle, Pennsylvania
1140 kc, 5 kw, DA

April 29, 1965
Hall County Broadcasting Co.
Gainesville, Georgia
1580 kc, 5 kw (1kw-CH), D

April 29, 1965
Kittyhawk Broadcasting Corp.
Kettering, Ohio
1140 kc, 1 kw, DA

November 4, 1964
Mansfield Broadcasting Co. (WCLW)
Mansfield, Ohio
1570 kc, 1 kw DA, D

November 4, 1964
Sawnee Broadcasting Co.
Cumming, Georgia
1140 kc, 1 kw DA, D

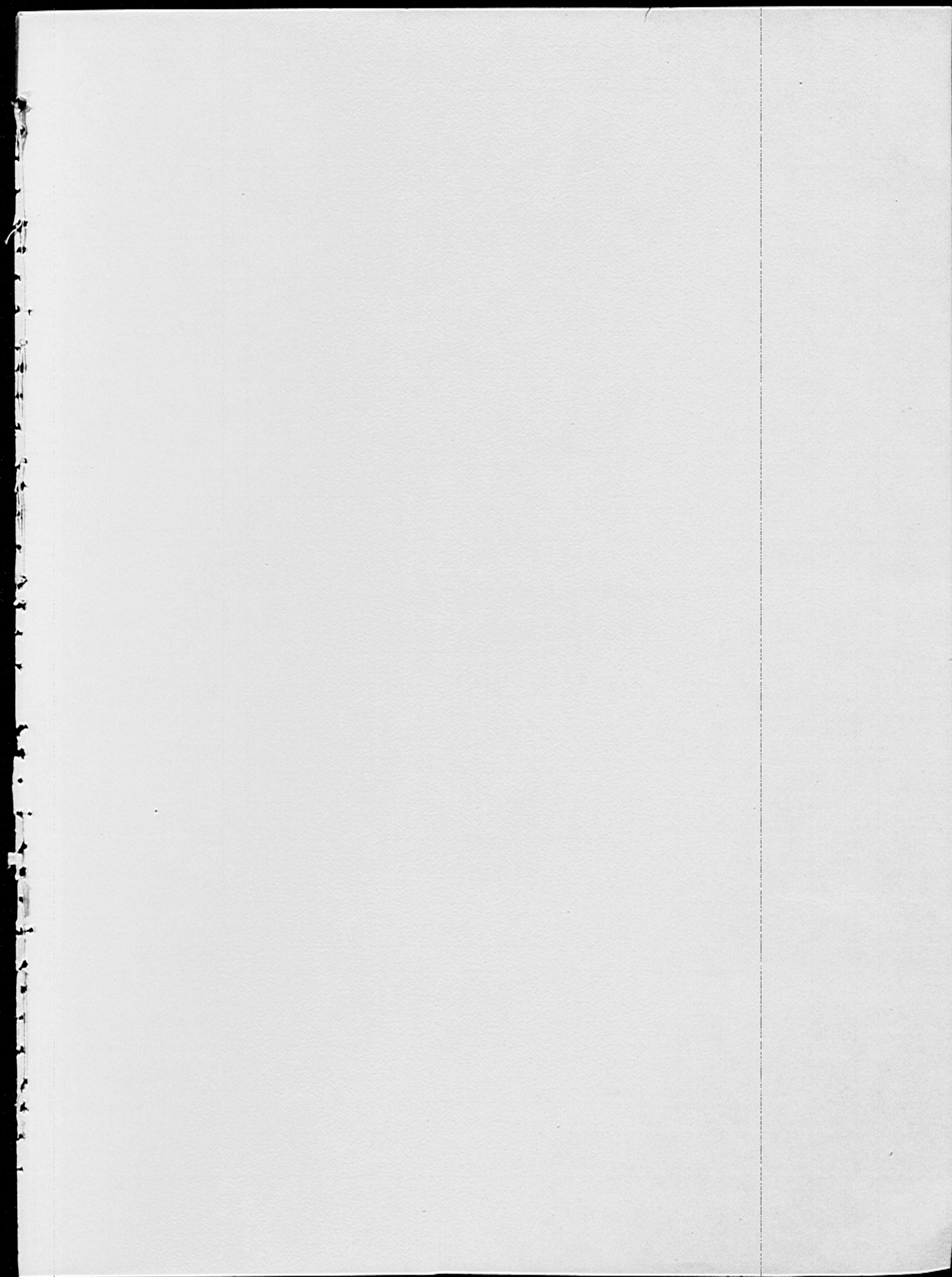
July 8, 1964
Suburban Broadcasters
Burien, Washington
800 kc, 1 kw, DA, D

January 30, 1964
KPUG, Inc.
Bellingham, Washington
1170 kc, 1 kw, DA-1

October 10, 1963
Whiteville Broadcasting Co. (WENC)
Whiteville, North Carolina
1220 kc, 1 kw, D

May 9, 1968
DeKalb Broadcasting Co.
Camden, South Carolina
1130 kc, 1 kw

May 9, 1968
The Kershaw County Broadcasting Co.
Camden, South Carolina
1130 kc, 1 kw



BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,741

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
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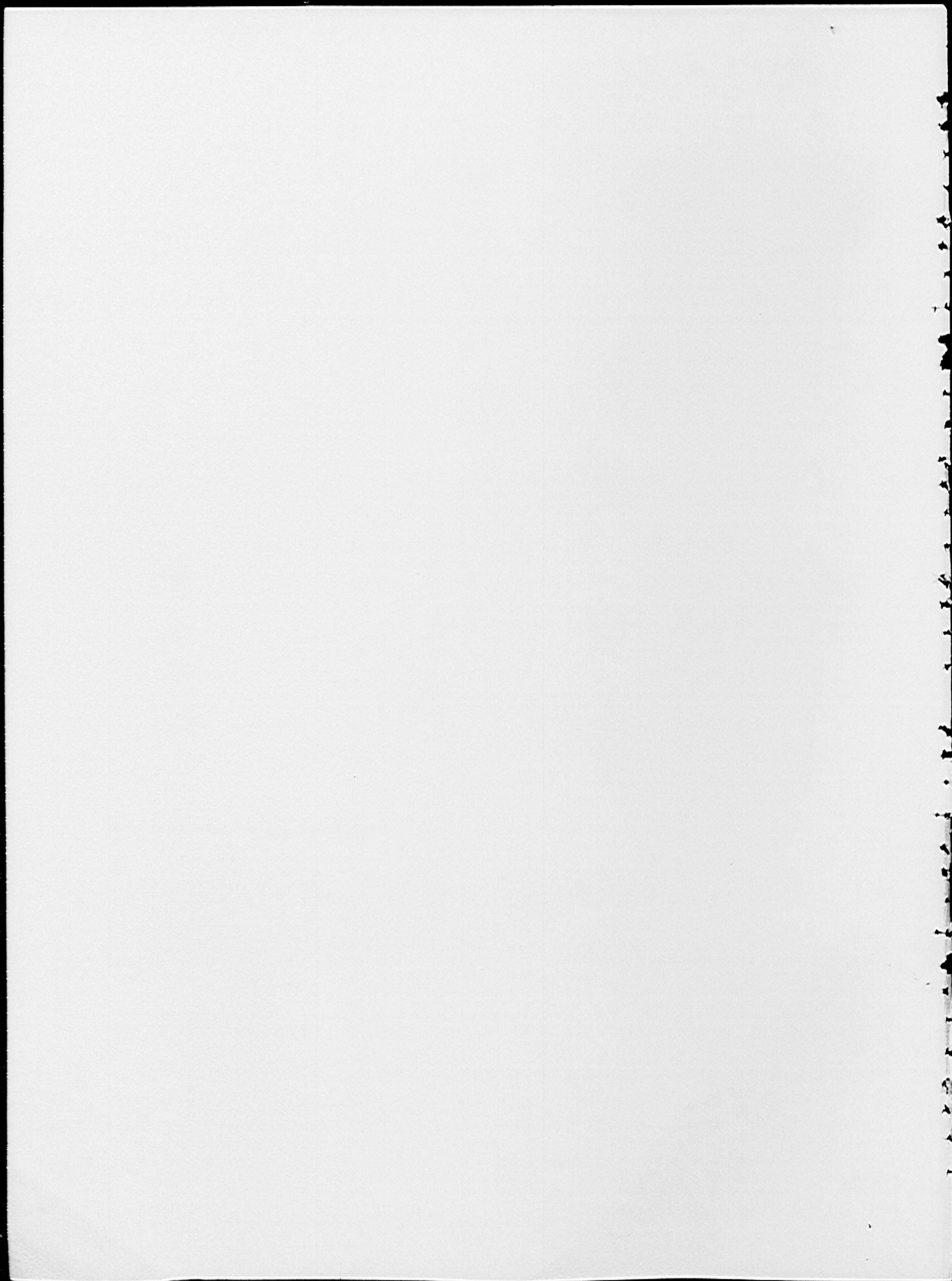
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Federal Communications Commission
Washington, D. C. 20554

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 21 1968

Nathan J. Paulson
CLERK



STATEMENT OF QUESTIONS PRESENTED

The questions presented are correctly set forth on the first page of appellant's brief.

TABLE OF CONTENTS

	<u>Page</u>
COUNTERSTATEMENT OF THE CASE	1
1. Background	2
2. The Present Application	5
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE COMMISSION'S REFUSAL TO WAIVE ITS RULES AND ACCEPT APPELLANT'S APPLICATION FOR FILING WAS AN ENTIRELY REASONABLE EXERCISE OF DISCRETION.	8
CONCLUSION	19

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Albertson v. Federal Communications Commission</u> , 100 U.S. App. D.C. 103, 243 F.2d 209 (1967).	16
* <u>Ashbacker Radio Corp. v. Federal Communications Commission</u> , 326 U.S. 327 (1945).	7, 16, 18
* <u>Bendix Aviation Corp. v. Federal Communications Commission</u> , 106 U.S. App. D.C. 304, 272 F.2d 533 (1959), <u>cert. denied sub nom. Aeronautical Radio Inc. v. United States</u> , 361 U.S. 965 (1960).	17
<u>Buckley-Jaeger v. Federal Communications Commission</u> , ___ U.S. App. D.C. ___, ___ F.2d ___ (D. C. Circuit Case No. 21,017, decided May 3, 1968).	9
<u>Conley v. United States</u> , ___ F.2d ___ (10th Cir. Case No. 9503, decided April 22, 1968).	9
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<u>Guinan v. Federal Communications Commission</u> , 111 U.S. App. D.C. 371, 297 F.2d 782 (1961).	17
<u>Kessler v. Federal Communications Commission</u> , 117 U.S. App. D.C. 130, 326 F.2d 673 (1963).	7, 18
<u>KXA, Inc. v. Federal Communications Commission</u> , D. C. Cir., Case No. 20,527, decided June 30, 1967.	2, 18
<u>National Broadcasting Co. v. Federal Communications Commission</u> , 123 U.S. App. D.C. 116, 362 F.2d 946 (1966).	2
<u>Pittsburgh Radio Supply House v. Federal Communications Commission</u> , 69 App. D.C. 22, 98 F.2d 303 (1938).	7, 17
* <u>The Goodwill Station, Inc. v. Federal Communications Commission</u> , 117 U.S. App. D.C. 64, 325 F.2d 637 (1963).	2
* <u>Unemployment Commission v. Aragon</u> , 329 U.S. 143 (1946).	16
<u>United States v. Storer Broadcasting Corp.</u> , 351 U.S. 192 (1956).	6, 7, 9, 17
<u>United States v. Tucker Truck Lines</u> , 344 U.S. 33 (1952).	16
<u>Wheeling Antenna Co. v. Federal Communications Commission</u> , ___ F.2d ___ (4th Cir. Case No. 11,649, decided February 28, 1968).	9

Statutes:

Page

Communications Act of 1934, as amended, 48 Stat. 1064
47 U.S.C. 151 through 609

Section 307(b)	19
Section 309	17, 19
Section 402(b)	1
* Section 405	16

Rules and Regulations of the Federal Communications
Commission, 47 CFR

* Section 1.569	4, 5, 6, 7, 8, 15
Section 73.21(a)	3
Section 73.37	13

Other Authorities:

<u>Amendment of Section 1.569 of the Commission's Rules,</u> 3 Pike and Fisher, R.R. 2d 1501 (1964).	4
<u>Annapolis Broadcasting Corp. (WANN),</u> 6 F.C.C. 2d 195 (1966).	16
<u>Clear Channel Broadcasting in the Standard Broadcast</u> <u>Band,</u> 31 F.C.C. 565, 21 Pike and Fischer, R.R. 1801 (1961) <u>reconsideration denied,</u> 24 Pike and Fischer, R.R. 1595 (1962).	3, 4, 15, 19
<u>Lauderdale Broadcast, Inc.,</u> 10 Pike and Fischer, R.R. 2d 510 (1967).	15
<u>Letter to Benjamin F. Thomas and Ray A. Grove,</u> 2 F.C.C. 2d 330 (1966).	16
<u>Letter to Near North Broadcasting Co.,</u> 5 F.C.C. 2d 507 (1966).	16
<u>Letter to Ralph B. Hunter,</u> 2 F.C.C. 2d 329 (1966).	16
<u>Letter to Vernon Broadcasting Co. of Tennessee,</u> 5 F.C.C. 2d 506 (1966).	16

* Cases and other authorities chiefly relied upon are
marked by an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,741

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal was filed pursuant to section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. section 402(b), from a Commission letter of November 3, 1967 (R. 83-4) returning appellant's application and denying appellant's request for waiver of section 1.569 of the Commission's rules, 47 CFR section 1.569. Appeal is also taken from a Memorandum Opinion and Order released February 12, 1968 (R. 80-82) denying reconsideration of the earlier letter returning the application.

This case involves another aspect of the so-called "clear-channel problem," with which this Court has dealt on numerous occasions in the past.^{1/} However, both the facts and the policy considerations pertinent to the present appeal are relatively simple and may be briefly stated.

1. Background

In 1945 the Commission instituted a rule making proceeding to determine whether and in what manner it would serve the public interest to amend the rules governing clear channel allocations. The proceeding was begun largely as a result of insistent claims by interested persons that the clear channel concept of permitting only one station to operate at night on twenty-five of the clear channels available for standard broadcasting was wasteful of valuable spectrum space and that the power limitation of 50 kilowatts was not an efficient utilization of the frequencies involved. The purpose of the proceeding was to explore the possibility of improving and

^{1/} The 1961 Clear Channel decision was affirmed by this Court in The Goodwill Station, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963), except for problems concerning 770 khz which are not relevant here. The most recent appeal to this Court concerning implementation of the clear channel rules was KXA, Inc. v. Federal Communications Commission, Case No. 20,527, in which the Commission's refusal to waive its rules was affirmed by order dated June 30, 1967. The most recent opinion of the Court dealing with and summarizing the history of the Clear Channel proceeding appears at 124 U.S. App. D.C. 116, 362 F.2d 946 (1966), in the case of National Broadcasting Co. v. Federal Communications Commission.

extending radio service in areas of the country that did not receive primary groundwave standard broadcast service (referred to as "white area").^{2/}

Following complex and lengthy proceedings on this matter, the Commission issued its decision on September 14, 1961. See Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565, 21 Pike and Fischer, R.R. 1801 (1961), reconsideration denied, 24 Pike and Fischer, R.R. 1595 (1962). In sum, the Commission concluded that the public interest would be best served by permitting the assignment of one Class II-A unlimited time station to each of eleven Class I-A channels.^{3/} These were the "duplicated" or

^{2/} A standard broadcast station transmits two types of signals, a groundwave and a skywave signal. The Commission's rules recognize "primary service" as that provided by a station's groundwave signal; "secondary service" is that which is provided at night by a station's skywave signal, i.e., the portion of the energy which travels upward and outward from the transmitter into the upper atmosphere (the ionosphere), from which it is reflected back to earth at night at distances much greater than the reach of groundwave signals. Skywave signals are less constant in intensity than groundwave signals because of the continuous change in the characteristics of the ionosphere and other variables (e.g., latitude, time of year, sunspot activity, weather, atmospheric noise, and particularly the time of day) resulting in "fading" from time to time in skywave reception. The only stations whose secondary service is recognized by the Commission are Class I stations, 31 F.C.C. at 567-568.

^{3/} "A clear channel is one on which the dominant station or stations render service over wide areas, and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas," 47 CFR 73.21(a). A Class I station is a dominant station operating on a clear channel with not less than 10 and not more than 50 kilowatts of power, designed to achieve relatively wide coverage, 47 CFR 73.21(a)(1). A Class II-A station is an unlimited time secondary station operating on one of the clear channels listed in 47 CFR 73.22 and assigned to a community within a state specified in the table contained in the section. A Class II-A station operates with a power not less than 10 kilowatts nighttime nor more than 50 kilowatts at any time, 47 CFR 73.21(a)(2)(1).

"broken down" channels. Twelve remaining I-A frequencies were to be maintained in status quo with a view toward their possible future use either for additional II-A facilities or for use of higher power (up to 750 kw) by existing stations. Accordingly, the current rules do not permit applications to be filed for use of these twelve unduplicated channels. In addition, because unrestricted use of channels adjacent to the twelve unduplicated or reserved channels could have a prejudicial effect on their ultimate use, the Commission imposed restrictions on these adjacent channels as well. The restrictions were originally promulgated as a supplement to the Clear Channel decision, 21 Pike and Fischer, R.R. 1843, and were intended to end in 1964. Subsequently this time limitation was deleted. Amendment of Section 1.569 of the Commission's Rules, 3 Pike and Fischer, RR. 2d 1501 (1964).

Under the terms of Section 1.569 of the rules, to be acceptable for filing an application proposing the use of a frequency adjacent to one of the unduplicated clear channels must show compliance with several specified engineering criteria.^{4/} Applications which meet these standards are regarded as involving no prejudice to various possible future uses of the clear channel. On the other hand, applications which fail to comply are deemed unacceptable and are received and processed only when supported by a waiver request satisfying the Commission that the proposal if granted entails no prejudice to future utilization of the clear channel.

^{4/} The pertinent provisions of the rule are quoted infra, at p. 8.

2. The Present Application

On August 17, 1967, appellant applied for a new AM station to operate daytime at Pharr, Texas, on the frequency 850 khz, a frequency which is adjacent to 830 khz, one of the unduplicated clear channels. Recognizing that the application conflicted with Section 1.569 of the rules, appellant included a request for waiver and a supporting engineering study. Appellant sought to show that a Class II-A station could be allocated in Encino, Texas, with a particular mode of operation which would not involve any conflict with the proposal, but that no II-A was possible in the Pharr area. Following careful study of the engineering exhibits submitted by appellant, the Commission found that the application failed to demonstrate that it would not prejudice a possible future II-A allocation, and accordingly, the application was returned. In its letter to the applicant explaining why the application was unacceptable, the Commission observed:

It is indicated in your application that the directionalized daytime pattern for the assumed Class II-A is required to provide protection to XERI, Ciudad Reynosa, Mexico (810 kc, 250w, Day). However, the Mexican Agreement specifies a 1 to 30 desired to undesired signal ratio within the service area of the station to be protected (i.e., the 15 mv/m contour from the assumed Class II-A station should not overlap the 0.5 mv/m contour of XERI). From this it can be determined that a Class II-A facility could operate with 10 kw non-directional during daytime hours at a location where white area exists, protect all existing stations, but involve 2 and 25 mv/m overlap with your proposed operation (R. 83).

Appellant sought reconsideration of this ruling (R. 77-79), raising additional engineering arguments and claiming a right to a hearing under United States v. Storer Broadcasting Co., 351 U.S. 182 (1956). The Commission denied reconsideration (R. 80-82) and this appeal was brought.^{5/}

^{5/} The instant proposal was mutually exclusive with other proposals for new AM stations in the Houston area. The other applications were accepted for filing because they successfully demonstrated that they would not violate the terms of 1.569.

SUMMARY OF ARGUMENT

The Commission acted reasonably and well within its discretion in returning as unacceptable for filing an application which failed to comply with the rules or to demonstrate reasons, sufficient if true, to justify a waiver. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Pittsburgh Radio Supply House v. F.C.C., 69 App. D.C. 22, 98 F.2d 303 (1938). Appellant's application squarely violated 47 CFR section 1.569, concerning channels adjacent to certain reserved clear channels, and the request for waiver simply failed to demonstrate on an engineering basis that the grant of appellant's proposal might not have a prejudicial effect on future use of the clear channel in question.

There was no need for an evidentiary hearing as the basic dispute in this case concerns not engineering determinations, but rather a policy judgment as to the desirability vel non of certain kinds of AM assignments. Appellant does not attack the underlying policy decisions reserving the clear channels for future use, nor the restrictions which have been placed on adjacent channels to implement this judgment.

The return of appellant's application is consistent with a long line of Commission determinations returning similar applications for a failure to show a lack of potential prejudice.

Neither Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), nor Kessler v. F.C.C., 117 U.S. App. D. C. 130, 326 F.2d 673 (1963), entitled appellant to a comparative hearing. As its application was fundamentally defective, it was entitled to no comparative consideration at all. Moreover, appellant failed to seek comparative consideration before the Commission.

ARGUMENT

I. THE COMMISSION'S REFUSAL TO WAIVE ITS RULES
AND ACCEPT APPELLANT'S APPLICATION FOR FILING
WAS AN ENTIRELY REASONABLE EXERCISE OF DISCRETION.

Section 1.569 of the rules provides that to be accepted and considered, an application for a frequency adjacent to any of the twelve unduplicated clear channels must at the threshold meet certain specified engineering standards. These requirements, to the extent pertinent to this case, are set out as follows in the rule:

§1.569 (b) (2)

Applications for new stations on, change of existing stations to, or for any major change in operation of stations presently operating on the designated frequencies will be accepted for filing and acted upon in normal course provided they are accompanied by appropriate exhibits and necessary supporting data to show clearly the following with respect to all Class I-A channels within 30 kc/s of the designated frequency:

(i) The proposed transmitter site is located inside the area encompassed by a 500 mile extension of the 0.5 mv/m-50 percent nighttime contour of Class I-A stations on unduplicated channels.

* * *

(iii) No interference or prohibited overlap would be caused to an assumed Class II-A station on an unduplicated channel, radiating at least 1238 mv/m omnidirectionally from the nearest point on the boundary described in subdivision (i) of this subparagraph.

Appellant's application did not meet these specifications. Instead it was accompanied by a request for a waiver in which on the basis of engineering exhibits it was argued that the application if granted would not inhibit future use of the adjacent clear channel by Class II stations in the manner contemplated by the Clear Channel decision. The Commission considered the waiver request but concluded that it did not justify a waiver of the rule.

Appellant's major argument is that it was entitled to a hearing on its request for waiver. There is, of course no right to a hearing on such a request. Buckley-Jaeger v. Federal Communications Commission, ___ U.S. App. D. C. ___, ___ F.2d ___, (D. C. Circuit Case No. 21,017, decided May 3, 1968); Conley v. United States, ___ F.2d ___ (10th Cir. Case No. 9503, decided April 22, 1968); Wheeling Antenna Co. v. Federal Communications Commission, ___ F.2d ___, (4th Cir. Case No. 11,649, decided February 28, 1968). Only where "the accompanying papers . . . set forth reasons, sufficient if true, to justify a change or waiver" is a hearing required. United States v. Storer, 351 U.S. 192, 205. This is not the case here. As we show below there is no factual dispute involved. The area of disagreement between appellant and the Commission is in the inferences to be drawn from the engineering data submitted. The agency was not persuaded that the showing demonstrated a lack of impact on possible future use of the affected clear channel and accordingly it concluded

that an exemption from the rule was not warranted. This kind of judgment is plainly entitled to great weight, and appellant has shown no reason why it should be overturned.

Appellant attempted to show in two ways that its proposal would not prejudice the possible assignment of a II-A in the area of its own operation. Appellant's engineer first sought to demonstrate that a class II-A station could be assigned to the area which would comply with all protection requirements, foreign and domestic, and which would be compatible with the assignment requested by appellant. The Commission found this showing to be inadequate:

It is indicated in your application that the directionalized daytime pattern for the assumed Class II-A is required to provide protection to XERI, Ciudad Reynosa, Mexico (810 kc, 250w, Day). However, the Mexican Agreement specifies a 1 to 30 desired to undesired signal ratio within the service area of the station to be protected (i.e. the 15 mv/m contour from the assumed Class II-A station should not overlap the 0.5 mv/m contour of XERI). From this it can be determined that a Class II-A facility could operate with 10 kw non-directional during daytime hours at a location where white area exists, protect all existing stations, but involve 2 and 25 mv/m overlap with your proposed operation (R. 83).

The Commission therefore rejected the proposal. In less technical terms, the Commission found, after a careful study of the engineering submitted by appellant, that modes of operation by a theoretical class II-A in the area, other than those set out by appellant,

were possible, and that they would involve prohibited overlap with the proposal of the 2 and 25 mv/m signal strength contours. Thus, appellant's proposal if granted would to some degree plainly inhibit Class II-A operation; hence a waiver of the rule was deemed contrary to the public interest.

Appellant's engineering exhibits also sought to show that while one particular mode of II-A operation could be allocated in the Encino area (some 50 miles from Pharr) along with its own proposal, such an operation would not be a very practical or feasible one, and that no practical or feasible II-A allocation could be made anywhere in the Pharr area.^{6/} On reconsideration, appellant again argued that no II-A could be allocated to the area of concern

^{6/} Some confusion may arise in this case because of imprecision in appellant's brief. After quoting at length from its own engineering exhibit, appellant states: "Thus, applicant's consultant pointed out that even if some sort of Class II-A station could be allocated to the area (which he does not concede), it would necessarily be an inefficient facility . . ." (Br., p. 14). The plain fact is that the consultant did show that a II-A could be allocated near Pharr: "Figure B-3 is a hypothetical 10 kw directional nighttime pattern which would be potentially capable of being installed at, for example, Encino, Texas." (R. 53 and Br., p. 13). (Encino is 50 miles from Pharr.) We believe appellant therefore meant to say that no potential II-A was feasible in the immediate vicinity of Pharr. This, however, is completely irrelevant since it is not necessary for the potential II-A to be in the area at all. As the Commission noted: "it is not possible to anticipate at this time the particular location or mode of operation which may be utilized by a II-A assignment on 830 kc" (R. 83).

because of 2 mv/m and 25 mv/m overlap between the theoretical II-A and XERI, a Mexican station. This petition for reconsideration was unsupported by any further engineering exhibits and bore only the signature of counsel for applicant. The Commission again found that a II-A might be located in the area of concern, (an area much wider than that contiguous to Pharr), and that the proposed Pharr operation would, in fact, prejudice its assignment to that area (R. 81).

Appellant states that it is entitled to a hearing to determine who is correct--its own, or the Commission's engineers (Br., p. 14), and, assuming the Commission is correct, a hearing is nevertheless necessary to determine if the other conceivable II-A operations are "practicable." Id.

We believe, however, a close examination of the facts will show that there is no conflict in the engineering conclusions of decisional significance. There is no dispute that the theoretical II-A facility which the appellant is obligated to protect need not be in the immediate vicinity of Pharr. It may be anywhere in the region where its establishment is not otherwise precluded. Accordingly, even if appellant were correct that no II-A is technically possible in the immediate Pharr area, that would not be a sufficient showing of the lack of possible prejudice. Furthermore, the appellant sought to show, and succeeded in showing, that one particular mode of II-A

operation not mutually exclusive with its proposal, was technically feasible in Encino, Texas, which is only 50 miles from Pharr. What the Commission held the applicant failed to show was that it was the only technically conceivable mode of operation for a II-A in that general region. In other words while appellant may have shown that one future use of the channel by II-As was still possible, this is not the test; it was obliged to show that no future use would be eliminated by a grant of its proposal, and this it did not do.

In order to illustrate the manner in which appellant failed to meet the engineering standards set out in the rule, we have attached hereto as appendix A an exhibit which is taken from appellant's own engineering exhibit (R. 56). It demonstrates that the proposal's 2 mv/m and 25 mv/m contours extend into Texas substantially further than do those of XERI. Since the II-A's 2 mvm/m and 25 mv/m contours cannot overlap with those of either XERI or the proposed facility under section 73.37,^{7/} this exhibit makes quite clear the substantial area in which prejudice would result if the proposal were granted.

Appellant has presented to this Court no evidence nor even argumentation, to suggest that the Commission's technical conclusions in this respect are erroneous.

^{7/} In its petition for reconsideration appellant itself noted the 2 and 25 mv/m prohibited overlap problem which II-A's must face.

Although it is not expressly so stated in appellant's brief, we believe the thrust of its argument to be not that the Commission's engineering is defective, but that the Commission's policy views are undesirable. The underlying engineering problems are merely a reflection of differing views as to the proper implementation of the future use of the unduplicated I-A channels. The real conflict thus turns on appellant's second allegation--that a II-A allocation, though technically feasible would not be practical. In the Commission's view, the possible prejudice of any conceivable II-A facility is undesirable and not to be permitted. What appellant contended was that while a II-A might technically be possible, it would not be a desirable or economically feasible one. But no effort was made to show that this is so, and the Commission has held many times that considerations of this kind may not be relied on in support of a proposal which will technically prejudice a potential II-A allocation. They are difficult to establish with certainty and may be subject to change. As the Commission has sought to preserve the maximum degree of flexibility with respect to the uses to which these channels may be put, it is clearly reasonable for it to insist on the most conclusive kind of engineering showing before granting a waiver. The policy of rejecting those applications which might prejudice the long range implementation of the clear channel

objectives has been clearly stated by the Commission. See Clear Channel Broadcasting, 21 Pike & Fischer, R.R. 1801 (1961). Appellant nowhere challenges this policy nor demonstrates that its application to the facts of this case is arbitrary.

Appellant has not demonstrated a single instance in which the provisions of 1.569 have been waived on the basis of a showing such as that made by appellant here. In cases where the Commission has approved applications for channels adjacent to the unduplicated I-A channels, the applicant was able to show that no II-A could be established in the area because other existing stations already precluded its assignment, or because of the absence of "white area," the presence of which is a prerequisite for the assignment of a II-A station.^{8/}

In fact, the Commission has been assiduous in applying 1.569 strictly, and many proposals have been rejected for failure to meet the required showing that no possible prejudice will result. Even the slightest possible prejudice has been considered unacceptable.

^{8/} While appellant has listed in an appendix to its brief some fifty-four instances in which such applications were accepted for filing, there is no indication that any of them presented facts similar to those of this case, or that the engineering exhibits in support of the application failed, as does that here, to show the lack of prejudice. See, e.g., Lauderdale Broadcast, Inc., 10 Pike and Fischer, R.R. 2d 511 (1967).

Annapolis Broadcasting Corp. (WANN), 6 F.C.C. 2d 195 (1966); Letter to Near North Broadcasting Co., 5 F.C.C. 2d 507 (1966); Letter to Vernon Broadcasting Co. of Tennessee, 5 F.C.C. 2d 506 (1966); Letter to Benjamin F. Thomas and Ray A. Grove, 2 F.C.C. 2d 330 (1966); Letter to Ralph B. Hunter, 2 F.C.C. 2d 329 (1966).

Nor do we believe appellant is entitled to a hearing under the doctrine established in Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945).

Initially, we note that section 405 of the Communications Act, 47 U.S.C. section 405, unequivocally establishes that no "question of fact or law" may be raised on appeal which has not been raised before the Commission. Florida Gulfcoast Broadcasters v. Federal Communications Commission, 122 U.S. App. D.C. 250, 352 F.2d 726 (1965); Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957). See also United States v. Tucker Truck Lines, 344 U.S. 33 (1952); Unemployment Commission v. Aragon, 329 U.S. 143 (1946). Appellant never claimed before the Commission that it was entitled to a hearing under the Ashbacker principle. The Commission has not had a chance to rule on the question, and it is therefore improperly raised on appeal.

Aside from this, however, the argument is wholly without merit. In Ashbacker, the question before the Court was "whether

an applicant for a construction permit . . . is granted the hearing to which he is entitled by §309(a) of the Act, where the Commission, having before it two applications which are mutually exclusive, grants one without a hearing and sets the other for hearing," Id., 327-328, (emphasis added). The Court held that since a grant of the former precludes a grant of the latter, the hearing "becomes an empty thing," thus violating the statute. But here, appellant, unlike Ashbacker, has no statutory right to a hearing. Its application on its face violated the Commission's rules; and where this is so Section 309 has been construed as requiring a hearing only if "the accompanying papers . . . set forth reasons, sufficient if true, to justify a change or waiver of the Rules." United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). Bendix Aviation Corp. v. Federal Communications Commission, 106 U.S. App. D.C. 304, 272 F.2d 533 (1959), cert. denied sub nom. Aeronautical Radio Inc. v. United States, 361 U.S. 965 (1960); Pittsburgh Radio Supply House v. Federal Communications Commission, 69 App. D.C. 22, 98 F.2d 303 (1938). Since appellant did not make the requisite showing, its application was properly rejected. It was not entitled to comparative consideration with the other proposals because it was not entitled to further consideration at all.^{9/}

^{9/} See Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 374, 297 F.2d 782, 785 (1961), where this Court observed that there need not be "a comparative treatment of respective community needs in a situation where two applicants are competing for a mutually exclusive permit once it has been established that one of the competing applicants is basically unqualified."

An argument similar to that of appellant was presented to this Court recently in KXA, Inc. v. Federal Communications Commission, Case No. 20,527, decided by order of June 30, 1967. There an applicant for facilities which were not available because of restrictions on the use of duplicated clear channel frequencies argued that under the Ashbacker doctrine it was entitled to comparative consideration. The Commission rejected the argument, and this Court affirmed.

Nor does Kessler v. Federal Communications Commission, 117 U.S. App. D.C. 130, 326 F.2d 673 (1963), help appellant. There the Commission rejected certain applications filed after the date of a temporary freeze even though the rejected applications were mutually exclusive with applications on file prior to the imposition of the freeze. The Court held that if the Commission proposed to process those on file prior to the freeze, it could not deprive those filed thereafter, and mutually exclusive with those to be processed, of their Ashbacker rights to comparative hearing. There is no similarity in the present case. Each of the applications which was mutually exclusive with that of appellant either complied with the rule or demonstrated why a waiver was in the public interest. Appellant had an equal opportunity to show why it would not preclude a theoretical II-A facility and simply failed to make the showing. There was therefore no discrimination in the treatment of appellant, and Kessler is not in point.

Similarly neither section 307(b) nor section 309 of the Act, 47 U.S.C. sections 307(b), 309, entitles appellant to a hearing in these circumstances. The Storer case makes perfectly clear that an application in violation of the rules is not entitled to a hearing under section 309 of the Act, and if it is not entitled to hearing or comparative consideration, section 307(b), concerning fair and equal distribution of radio facilities, does not come into effect. However, even if section 307(b) were considered relevant, the fact is that the restrictions placed on the channels adjacent to the clear channels were themselves the product of a 307(b) determination, made in the Clear Channel decision, that some frequency space should be set aside for possible use in the future in underserved areas of the country.

CONCLUSION

For the foregoing reasons, we request that the action below be affirmed.

Respectfully submitted,

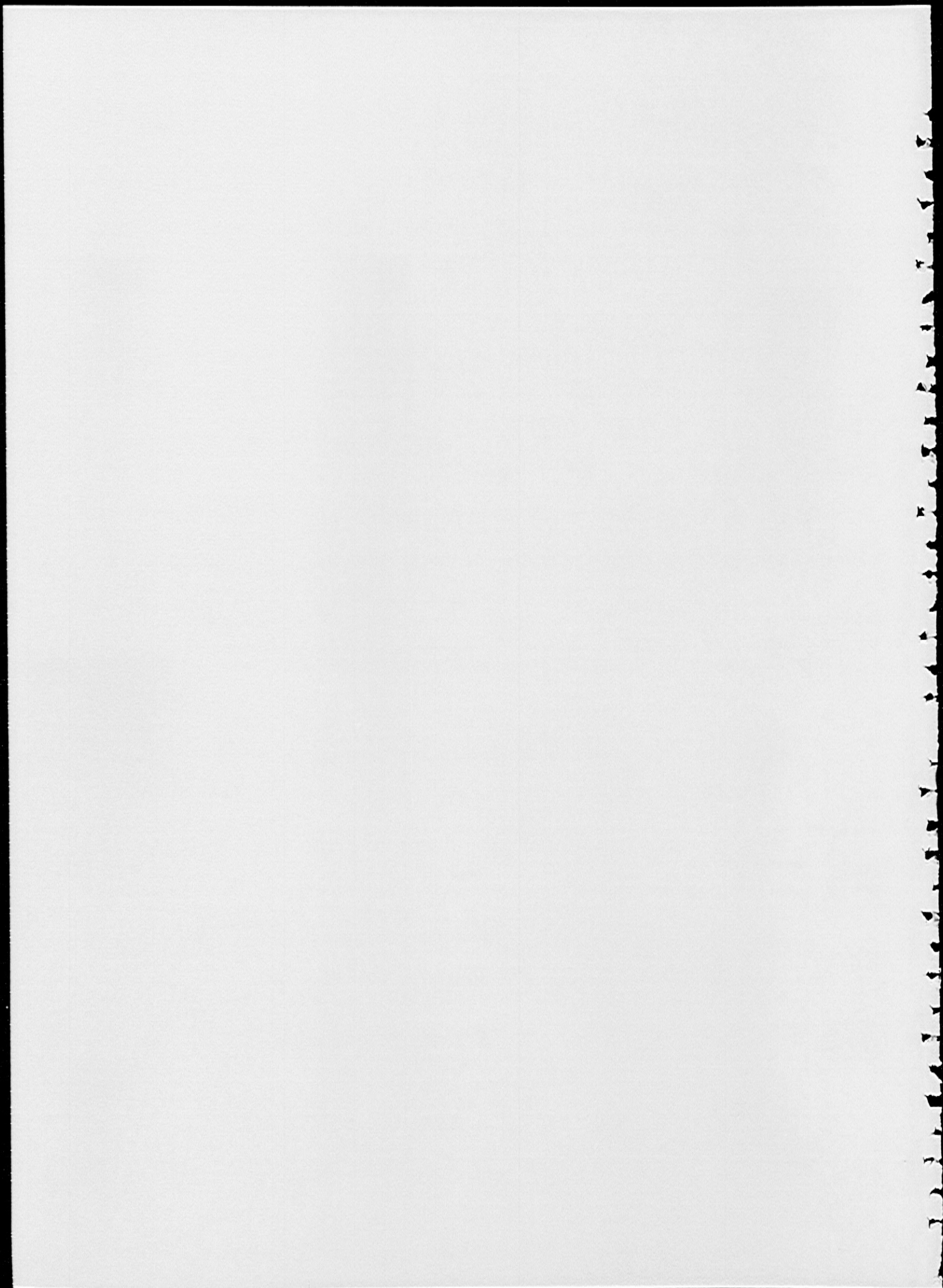
HENRY GELLER,
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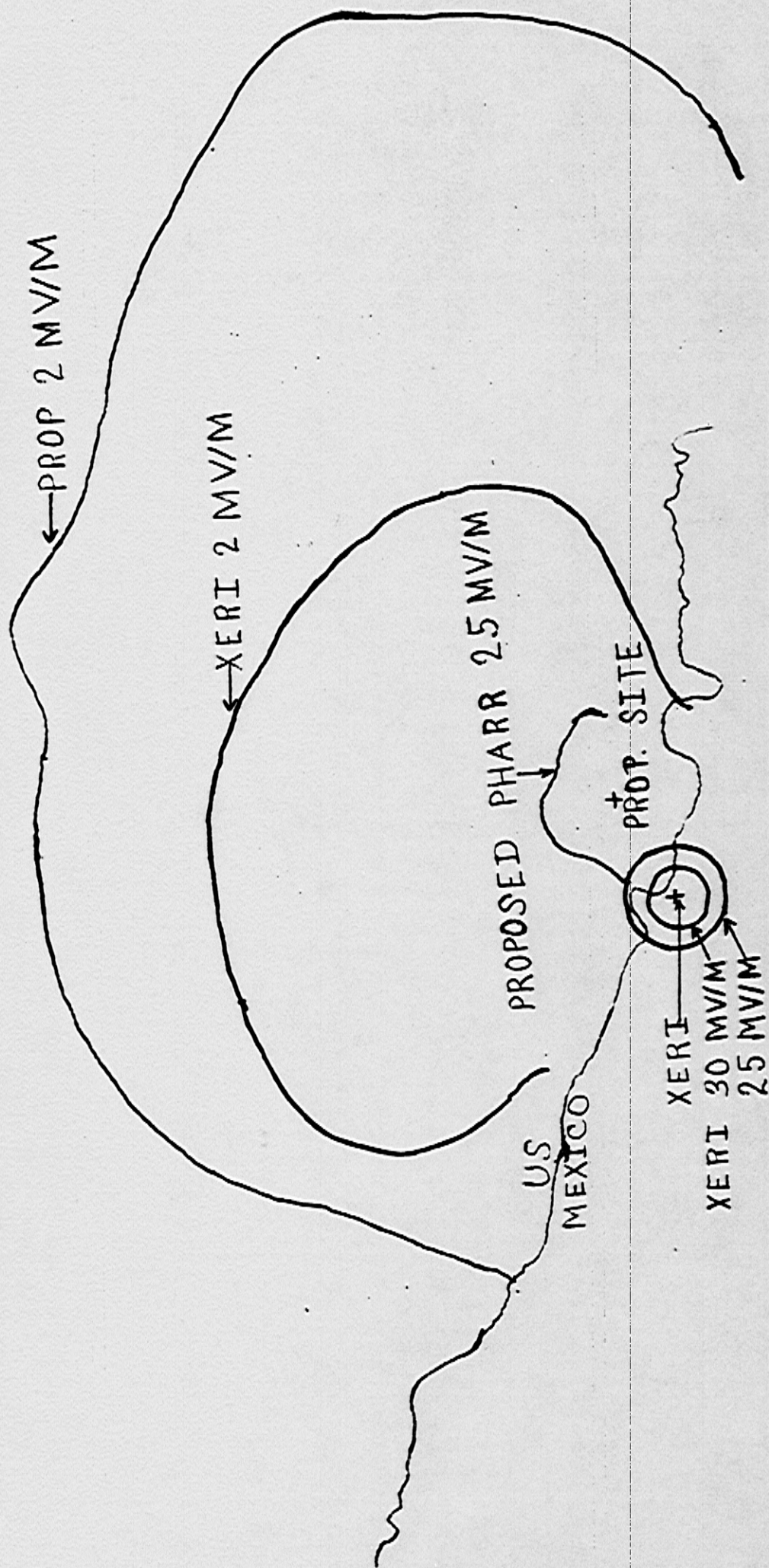
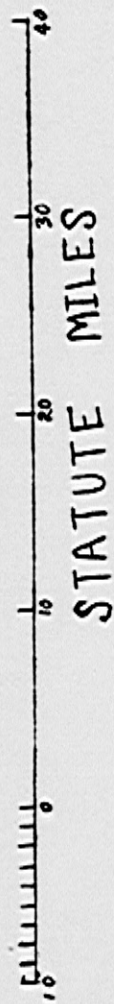
WILLIAM L. FISHMAN,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

June 11, 1968.



APPENDIX A (R. 56)



REPLY BRIEF FOR APPELLANT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,741

RIO GRANDE FAMILY RADIO FELLOWSHIP, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from a Memorandum Opinion and Order of
The Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 10 1968

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INDEX

	<u>Page</u>
REPLY TO BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION	1
A. The Commission's claim that its refusal to waive its rules and accept appellant's application for filing was a reasonable exercise of discretion is an unsupported conclusion of law	1
B. The Commission's contention that there is no conflict in the engineering conclusions of its engineers and those of Appellant is contrary to the record	5
C. The Commission's contention that the Appellant may not rely on the case of Ashbacker Radio Corporation v. F.C.C. is specious and constitutes an attempt to rely upon technicalities to avoid consideration of important arguments on their merits	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

<i>Londoner v. Denver</i> , 210 U. S. 373, 386 (1908)	3
<i>Ewing v. Mytinger & Casselberry, Inc.</i> , 339 U. S. 594 (1950)	3
<i>Louisiana Television Broadcasting Corp. v. F.C.C.</i> , 347 F.2d 808, 121 U. S. App. D. C. 24 (1965)	3
<i>Wometco Enterprises, Inc. v. F.C.C.</i> , 314 F.2d 266, 114 U. S. App. D. C. 261 (1963)	3

(ii)

	<u>Page</u>
<i>United States v. Storer Broadcasting Co.,</i> 351 U. S. 192 (1956)	4
<i>Ashbacker Radio Corporation v. F.C.C.</i> 326 U. S. 327 (1945)	6, 7

Rules and Regulations:

Federal Communications Commission, 47 C.F.R. (1966)	
Section 1.569	2, 4

Statutes:

Communications Act of 1934, as amended, 47 U.S.C., 151, <i>et seq.</i>	
Section 309	4, 6
Section 405	6
Administrative Procedure Act, 5 U.S.C., Sec. 554(d)	5

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REPLY BRIEF FOR APPELLANT

REPLY TO BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION

- A. The Commission's claim that its refusal to waive its rules and accept appellant's application for filing was a reasonable exercise of discretion is an unsupported conclusion of law.

In its reply brief, the Commission repeatedly asserts that there are certain specified engineering standards that must be met by all applicants for the frequency of 850 kHz in order to be accepted and considered.

But the Commission action denying the waiver of Section 1.569 of its rules recognizes, as does Appellee's reply brief, that a factual dispute exists as to whether these standards have in fact been met.

Boiled down to basic essentials, the central issue before the Commission in the proceedings below was as follows:

Would a grant of the application of Appellant preclude the utilization of the frequency 830 kHz for a future Class II-A station in the area where Appellant proposes to locate its station?

This, of course, is a question of fact. It is, moreover, a highly *material* issue of fact because, if Appellant can convince the Commission that the answer is negative, Appellant's application must be accepted for filing upon a waiver of Section 1.569 of the rules, in conformity with the numerous other cases where such waivers have been granted in the past upon parallel showings (see Appendix, page 9, of Appellant's brief).

That such material issues of fact may not be resolved without a proper adjudicatory hearing is well settled. As early as 1908, the Supreme Court dealt with the necessity of such a hearing in all such cases of controversy involving adjudicative facts. The case at issue then involved a board of assessment. The board assessed the plaintiffs' lands for the cost of paving a street, giving plaintiffs opportunity to file written complaints and objections but not to be heard. The Court held:

"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. . . . [A] hearing in its very essence demands that he who is entitled

to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner v. Denver*, 210 U. S. 373, 386 (1908).

In *Ewing v. Mytinger & Casselberry, Inc.*, the Supreme Court again emphasized the need for a full hearing before disputed adjudicative facts can be resolved. In the *Ewing* case, the Food and Drug Administrator made certain seizures of a product whose labels were alleged to be misleading. The Administrator held no hearing before the seizure, but the seizures were made as a means of instituting judicial proceedings involving full hearings. The Court upheld the failure to provide a hearing before the seizures, but stressed the need for a hearing at *some* stage of the proceedings, saying:

"It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950) at page 599.

Here, no hearing whatever has been held, at any stage. Rather, Appellant's substantial investment of time, money and effort in its application has been summarily dismissed without an opportunity to be heard. Yet, in the specific field of radio and television law, an entire line of decisions of this Court stresses the need for a full and fair hearing, where material factual issues exist. See, e.g., *Louisiana Television Broadcasting Corp. v. Federal Communications Commission*, 347 F.2d 808, 121 U. S. App. D. C. 24 (1965); *Wometco Enterprises, Inc. v. Federal Communications Commission*, 314 F.2d 266, 114 U. S. App. D. C. 261 (1963). Here, the Commission arbitrarily accepted the engineering showings presented by the other mutually exclusive applicants but rejected Appellant's showing without a hearing. In so doing, the Commission forever foreclosed the Appellant from competing with the other mutually exclusive applicants even

though the Appellant's engineering exhibits showed the existence of such applications and the conflict of Appellant's proposal therewith. By accepting the other applicants' engineering data in support of a waiver of Section 1.569 of the rules and rejecting Appellant's similar data, the Commission arbitrarily prejudiced Appellant, whereas designating Appellant's application for hearing with the inclusion of an issue to determine whether a satisfactory showing to merit waiver of the rules could not have prejudiced either Appellant or the other applicants. Such an action would have been in keeping with the Appellant's right to have a hearing on factual matters as provided in Section 309 of the Communications Act.

Examination of the rule in question shows that it contains no hard and fast guidelines by which the acceptability of an application can be determined, but rather requires a complicated engineering showing based on vague assumptions.¹ Where, as here, there is a factual dispute as to whether the rule should be waived, a mere threshold showing of compliance (as contrasted with the extensive showing made by the Appellant) should entitle the applicant to an evidentiary hearing — a hearing at which the Commission's unproved assumption that the proposal would preclude the assignment of some imaginary and unlocated station can be tested. Cf. *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956).

¹ The rule assumes that a Class II-A station could be allocated in an area, but is not specific enough to allow an applicant to know *where* this allocation is, or could be. An applicant, therefore, must explore as many locations as there are cities, towns, and communities in an unlimited area surrounding his proposed site.

B. The Commission's contention that there is no conflict in the engineering conclusions of its engineers and those of Appellant is contrary to the record.

Typical of the Commission's drawing unwarranted conclusions and placing incorrect interpretations upon the facts presented is the statement that there is no real conflict in the engineering conclusions (and here the Commission admits in its brief that their contentions are only conclusions) of Appellant's engineer and the Commission's engineers. This bald statement completely ignores all of the engineering data presented by the Appellant, and ignores equally the conflicting data tendered by the Commission in its denial of Appellant's request for waiver and its brief before the Court.

Appellee's brief fairly bristles with engineering arguments, seeking to sustain its contention that the conclusions of its staff engineers were correct and the conclusions of Appellant's engineer were incorrect. But this Court is not the proper forum in which to litigate this fundamental difference of fact and opinion.

The proper forum for the litigation of such question is a hearing before an Examiner of the Commission. At such a hearing, conducted — by necessity — in accordance with the provisions of Section 5(d) (5 U.S.C., Sec. 554(d)) of the Administrative Procedure Act, the Commission's Broadcast Bureau will not be free, as it was here, to act as judge and jury of the facts and the law. Rather, the Bureau and its engineers will be required to appear as parties, subject to besting through cross examination and subject to the introduction of rebuttal evidence by Appellant's own experts. The ultimate decision in such a hearing will be made by an unbiased Examiner, once again as required by the provisions of Section 554 of the Administrative

Procedure Act. Appellant is entitled to such a hearing by reason of the provisions of Section 309 of the Communications Act, previously cited. Appellant respectfully requests that this case be remanded to the Commission with instructions to afford Appellant the hearing which it deserves.

- C. The Commission's contention that the Appellant may not rely on the case of *Ashbacker Radio Corporation v. F.C.C.* is specious and constitutes an attempt to rely upon technicalities to avoid consideration of important arguments on their merits.

Appellee's contention that Appellant may not rely upon the doctrine of the *Ashbacker* case because such doctrine was not invoked in the proceedings below is contrary to fact and to law. True, Section 405 of the Communications Act provides that no new question of fact or law may be raised in appeal which was not raised before the Commission. But, as will be shown below, the requisite facts to establish the applicability of the *Ashbacker* doctrine to this case were clearly presented to the Commission in Appellant's original application, and the Commission has been on notice from the very beginning, of facts which should have indicated plainly that the doctrine applies.

Thus, Appellant's original application plainly disclosed that Appellant's application was one of a number of mutually exclusive applications. In fact, the application listed at least four such mutually exclusive applications, as follows:

<u>Application</u>	<u>File Number</u>	<u>Location</u>
Strauss Broadcasting Co.	BP 17,780	Houston, Texas
Artlite Broadcasting Co.	BP 17,577	Houston, Texas
Albert L. Crain	BP 17,550	Humble, Texas
Jester Broadcasting Company	BP 17,579	Nassau Bay, Texas

Accordingly, the Commission was put on notice that the rejection of Appellant's application would mean that some other, mutually exclusive, application would eventually be granted, thereby forever foreclosing a grant of Appellant's application.

It is hornbook law that where, as here, mutually exclusive applications are on file, the Commission may not pick and choose from these several applications and grant one and deny the others without a consolidated hearing. *Ashbacker Radio Corporation v. F.C.C.*, 326 U. S. 327 (1945). After more than 20 years of experience with the *Ashbacker* doctrine, the Commission can surely be expected to know the law.

The *Ashbacker* case constitutes merely a decided authority for a general proposition well-known to the Commission. The Commission's own brief in this proceeding contains numerous cases which were not cited in the decisions below. This is entirely proper. In its dealings with the Commission, Appellant sought to supplicate for relief. It did not demand, but rather, requested. But now that the Commission has denied the relief sought, the Appellant, like the Appellee, should be free to cite such cases in this Court as it wishes, in support of the general proposition that its legal position is correct and that the legal position of the other side is not.

CONCLUSION

In conclusion, the Commission's action in this case should be reversed, and the application of Appellant be consolidated with the other mutually exclusive applications for hearing.

Respectfully submitted,

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